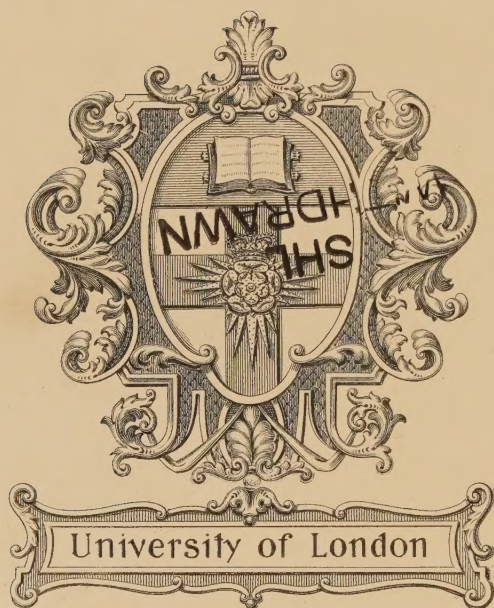


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THE SUPREME COURT OF THE UNITED STATES AS AN EXPOSITOR OF INTERNATIONAL LAW

By CHARLES CHENEY HYDE, Professor of
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THE extent to which a domestic court is or becomes an expositor of international law depends upon the will of the state whose instrumentality it is and on behalf of which it acts. The usefulness of the former as an expositor of that law is proportional to the scope of the power which the latter confers upon it—power, not merely to adjudicate upon questions of international aspect that may concern the state, but also, in the course of adjudications, to test the propriety of acts, embracing those of its own sovereign, by what it conceives to be the requirements of international law. The matter is one of judicial competence or freedom in cases where the requisite jurisdiction is yielded. A state may be reluctant to confer upon a domestic court full authority to apply such a test. Political or legislative departments may by appropriate acts legally and effectively frustrate the effort to obtain from a local tribunal its own views on the question whether the requirements of international law have been disregarded by its sovereign. Thus, despite acknowledgements that its own conduct must at all times conform to the requirements of international law, a state may be far from willing to permit a judicial agency of its own creation to challenge, especially at the instigation of a foreign litigant, the propriety of that conduct as manifested in official governmental acts that pertain to foreign affairs. In a word, it may not brook such interference at home with the pursuit of conduct that is associated with its contacts with the outside world.

The conduct of the United States has revealed no special endeavour to check the freedom or competence of its Supreme Court to reach and proclaim its own conclusions in the solution of questions of international law in cases where that tribunal has been possessed of the requisite jurisdiction. Moreover, the terms in which that jurisdiction has at times been conferred through provisions of the Constitution,¹ or of the statutory law,² have indi-

¹ See Art. III, section 2.

² According to paragraph 17 of the Federal Judicial Code, 36 Stat. 1093, 28 U.S.C.A. § 41 (17), the United States District Courts are given original jurisdiction "of all suits brought by any alien for a tort only, in violation of the laws of nations or of a treaty of the United States".

cated, with respect to the matters dealt with, the acknowledgment of a competence that was seemingly unchecked.

The evidence from these documentary sources has, moreover, sufficed to establish that the United States acknowledges that as international law is decisive of the propriety of its conduct in its external relations, that law is necessarily local to itself, and is, therefore, something to be applied as such by its tribunals as occasion may arise. Such a view was expressed by the Supreme Court in its opinion through Mr. Justice Gray in 1900, in the case of *The Paquete Habana*, when he said:

"International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."¹

Accordingly, the Supreme Court, denying the right of the United States in the course of the Civil War to extend its blockade of Texas to the territory of Mexico which was neutral, did not hesitate to declare:

"In cases such as that now in judgment, we administer the public law of nations, and are not at liberty to inquire what is for the particular advantage or disadvantage of our own or another country. We must follow the lights of reason and the lessons of the masters of international jurisprudence."²

If international law is operative upon the United States, it must be obvious that the violation of it by any department of the government, such as the Congress, would be fraught with serious consequences to the nation. Hence, the Supreme Court is reluctant to impute to that body a design to enact a law that would be contemptuous of the international obligations of the Republic. It is not disposed, therefore, to construe an Act of Congress as at variance with the requirements of international law, unless the evidence of an opposing legislative design leaves no alternative.³

¹ 175 U.S. 677, 700.

Declared Chief Justice M'Kean of the Supreme Court of Pennsylvania, in 1784, in the case of *Respublica v. De Longchamps*, 1 Dall. 111, 116, where the prisoner had been found guilty of unlawfully and violently threatening and menacing bodily harm to the person of the Secretary to the French Legation in the house of the French Minister: "The first crime in the indictment is an infraction of the law of nations. This law, in its full extent, is part of the law of this State, and is to be collected from the practice of different nations, and the authority of writers."

Declared Chief Justice Marshall in 1815, in the case of *The Nereide*, 9 Cranch 388, at 423: "If it be the will of the government to apply to Spain any rule respecting captures which Spain is supposed to apply to us, the government will manifest that will by passing an act for the purpose. Till such an act be passed, the Court is bound by the law of nations which is a part of the law of the land."

² *The Peterhoff*, 5 Wall. 28, 57.

³ See *MacLeod v. United States*, 229 U.S. 416, where at p. 434 it was said through

As evidence of the law of nations the Supreme Court seeks light from many sources. In the case of *The Paquete Habana*, it was declared that

"where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labour, research, and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."¹

Among the British writers whose views have been frequently quoted or cited may be noted Hall, Westlake, and Oppenheim, as well as Phillimore. The judicial opinions of foreign domestic tribunals have oftentimes been invoked; those of British judges have been utilized. In relation to matters pertaining to contraband and blockade, the Court has constantly sought the aid of Lord Stowell, whose conclusions have exerted a profound influence upon its thought.

In the earlier days of the Republic, the materials within the reach of the Court which shed light upon what might be deemed to be requirements of international law were relatively meagre. Apart from the texts of the classic writers and those of a few of their successors, the reports of Sir Christopher Robinson and other English collections of cases afforded the principal foreign data from which aid was available. The Court was hardly aware of, or seemingly unconcerned with, the importance of the texts of early treaties between other countries, or with the philosophy that was dominating the agreement-making policy that obtained in certain quarters.²

Mr. Justice Day: "The statute should be construed in the light of the purpose of the Government to act within the limitation of the principles of international law, the observance of which is so essential to the peace and harmony of nations, and it should not be assumed that Congress proposed to violate the obligations of this country to other nations, which it was the manifest purpose of the President scrupulously to observe and which were founded upon the principles of international law."

It may be observed that the Court is equally reluctant to impute to the Congress a design to violate the terms of an existing treaty. See *Cheung Sum Shee v. Nagle*, 268 U.S. 336.

See Fred. K. Nielsen, "Contribution of American Judiciary to the Maintenance of International Law", *American Bar Association Journal*, Vol. XXIII, p. 19.

¹ 175 U.S. 677, 700, citing *Hilton v. Guyot*, 159 U.S. 113, 163, 164, 214, 215.

² This seems to have been true with respect to contraband. Thus, in considering the circumstances when provisions might be fairly regarded as contraband, the Supreme Court, in 1816, in its opinion in the case of *The Commercen*, 1 Wheat. 382, was following the thought of Sir William Scott in *The Jonge Margaretha*, 1 C. Rob. 189. The political department of the Government was, however, proceeding to conclude treaties that were based on a different theory in harmony with that exemplified by the Treaty of the Pyrenees between France and Spain of November 7, 1659.

For that reason, its approach to international law may have differed somewhat from that made contemporaneously by the Department of State, which was conversant also with other materials and differing foreign viewpoints. During the past seventy years, however, the situation has been changed in this regard. The Supreme Court having within reach extensive materials illustrative of the practice of states generally, as well as their conventional arrangements, has been able, and at times disposed, to test and fortify its conclusions by reference to much pertinent foreign data. The Court may not, however, in the particular case deem it necessary to do so. In a decision to be noted later, which was handed down in 1926,¹ the tribunal doubtless felt that the British as well as American cases which it cited sufficed to justify the conclusions that were reached pertaining to the immunity from the local jurisdiction of a public ship engaged in commercial enterprise on behalf of its sovereign.

In the course of an interesting opinion, through Mr. Justice Cardozo in 1934, the Court was confronted with the question whether the boundary between the States of New Jersey and Delaware in a portion of Delaware Bay should be governed by the principle of *thalweg*, and more particularly, whether that principle should be applied as a test of the boundary in the eighteenth century when those entities ceased to be under the sovereignty of Great Britain.² After examining closely the data indicative of the growth of a common deference for the theory of *thalweg* as it had manifested itself in treaties of the eighteenth century, the learned Justice declared:

"The truth plainly is that a rule was in the making which was to give fixity and precision to what had been indefinite and fluid. There was still a margin of uncertainty within which conflicting methods of division were contending for the mastery. Conceivably that is true to-day in unusual situations of avulsion or erosion. . . .

"In 1783, when the Revolutionary War was over, Delaware and New Jersey began with a clean slate. There was no treaty or convention fixing the boundary between them. There was no possessory act nor other act of dominion to give to the boundary in bay and river below the circle a practical location, or to establish a prescriptive right. In these circumstances, the capacity of the law to develop and apply a formula consonant with justice and with the political and social needs of the international legal system is not lessened by the fact that at the creation of the boundary the formula of the *Thalweg* had only a germinal existence. The gap is not so great that adjudication may not fill it. (Lauterpacht, *The Function of Law in the International Community*, pp. 52, 60, 70, 85, 100,

¹ *Berizzi Brothers Company v. Steamship Pesaro*, 271 U.S. 562.

² *New Jersey v. Delaware*, 291 U.S. 361.

110, 111, 255, 404, 432.) Treaties almost contemporaneous, which were to be followed by a host of others, were declaratory of a principle that was making its way into the legal order. (Hall, *International Law*, 8th ed., p. 7.) International law, or the law that governs between states, has at times, like the common law within states, a twilight existence during which it is hardly distinguishable from morality or justice, till at length the imprimatur of a court attests its jural quality. (Lauterpacht, *supra*, pp. 110, 255; Hall, *supra*, pp. 7, 12, 15, 16; Jenks, *The New Jurisprudence*, pp. 11, 12.) 'The gradual consolidation of opinions and habits' (Vinogradoff, *Custom and Right*, p. 21) has been doing its quiet work.

"It is thus with the formula of the *Thalweg* in its application to the division between Delaware and New Jersey. We apply it to that boundary, which goes back to the Peace of Paris, just as we applied it to the boundary between Illinois and Iowa, which derives from a treaty of 1763."¹

It should be observed, however, that the Court was adjudicating upon a boundary dispute between two American commonwealths, and that for such purpose it may have been unnecessary to determine whether at a particular time in the eighteenth century the formula of *thalweg* had more than "a germinal existence" in the realm of international law.²

In 1812 the Court was confronted with a case involving, to quote Chief Justice Marshall, "the very delicate and important inquiry, whether an American citizen can assert, in an American Court, a title to an armed national vessel, found within the waters of the United States".³ He declared that in exploring an unbeaten path, with few, if any, aids from precedents or written laws, the Court found it necessary to rely much on general principles and on a train of reasoning, founded on cases in some degree analogous to that under consideration. In his opinion in behalf of the Court he adverted to the exclusive and absolute jurisdiction of a state within its own territory, which he said was susceptible of no limitation not imposed by itself, declaring that any restriction upon it

¹ *Ibid.* 382-4.

² For that reason one encounters difficulty in determining whether the Court was endeavouring to announce that in 1783 the principle of *thalweg* was incorporated in the law of nations.

In the case of *Iowa v. Illinois*, decided in 1893, the Court, through Mr. Justice Field, found occasion to declare: "In international law, therefore, and by the usage of European nations, the term 'middle of the stream', as applied to a navigable river, is the same as the middle of the channel of such stream, and in that sense the terms are used in the treaty of peace between Great Britain, France, and Spain, concluded at Paris in 1763." (147 U.S. 1, 8.)

³ *The Schooner Exchange v. McFaddon*, 7 Cranch 116, 136. The precise question involved was whether a vessel commissioned as a war-ship by the French Government, was, upon entering a port of the United States, subject to the jurisdiction of a local court whose aid was invoked by former owners of the vessel to determine whether their title had been lawfully divested by French authority.

deriving validity from an external source would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. He concluded, therefore, that all exceptions to the full and complete power of the nation within its own territories must be traced up to the consent of the nation itself, and that they could flow from no other legitimate source. Applying these principles to the instant case, he said that

"a foreign public armed vessel constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference cannot take place without affecting his power and his dignity. The implied license therefore under which such vessel enters a friendly port, may reasonably be construed, and it seems to the Court, ought to be construed, as containing an exemption from the jurisdiction of the sovereign, within whose territory she claims the rites of hospitality. . . . Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals. But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise."¹

It is not surprising that Chief Justice Marshall understood that exemptions from the local jurisdiction were necessarily to be derived from the consent of the territorial sovereign, or that he perceived why that consent, in the case of foreign vessels of war, should be given. It is of greater significance that in view of the previous attitude of his own country, as reflected in its legislation, he found it possible to conclude that the requisite consent was to be ascribed to the United States.² The decision was due, as this writer has observed elsewhere, to the assumption that a state such as his own intended to act in good faith and to the conclusion that there should be imputed to it actual consent to whatever yielding of jurisdiction the observance of good faith might demand.³

A century later the Supreme Court was confronted with the question whether the principle laid down in the case of *The Schooner Exchange v. McFaddon* was applicable to a foreign public ship employed for commercial purposes on behalf of its sovereign, and whether the use to which it was being put limited or destroyed the immunity from the local jurisdiction to which it might

¹ *Ibid.* 144 and 146.

² See Act of June 5, 1794, 1 Stat. 384; also, Act of March 3, 1805, 2 Stat. 339 and 342.

³ *International Law Chiefly as Interpreted and Applied by the United States*, Vol. I § 252.

normally be entitled.¹ In 1926, in the case of *Berizzi Brothers Company v. Steamship Pesaro*, the Court announced the following conclusion:

"The decision in *The Exchange* therefore cannot be taken as excluding merchant ships held and used by a government from the principles there announced. On the contrary, if such ships come within those principles, they must be held to have the same immunity as war-ships, in the absence of a treaty or statute of the United States evincing a different purpose. No such treaty or statute has been brought to our attention.

"We think the principles are applicable alike to all ships held and used by a government for a public purpose, and that when, for the purpose of advancing the trade of its people or providing revenue for its treasury, a government acquires, mans, and operates ships in the carrying trade, they are public ships in the same sense that war-ships are. We know of no international usage which regards the maintenance and advancement of the economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a naval force."²

The public aspect of the service of a ship is obviously unaffected by the circumstance that that service is identical with one which is commonly undertaken by private interests through private vessels. What causes the commercial uses of a ship to be public is the fact that the state to which the ship belongs is itself embarked in commercial enterprise and employs the vessel as an instrumentality thereof.³ In reaching the conclusion that it did, the

¹ In the case of *Ex Parte Muir*, decided in 1921, 254 U.S. 522, the Supreme Court found occasion to announce the methods by which a court of the United States should be advised of the foreign governmental claim that the relationship between a particular vessel and the interested foreign state sufficed to render the ship immune from the local jurisdiction. It declared that the government of such state was entitled to appear in a suit "to propound its claim to the vessel and to raise the jurisdictional question", or that with its sanction its accredited and recognized representative might appear and take the same steps in its interest, or that if there were objection on its part to appearing as a suitor in a foreign court, it was open to such government to make the asserted public status and immunity of the vessel the subject of diplomatic representation to the end that, if that claim was recognized by the Executive Department of the American Government, it might be set forth and supported in an appropriate suggestion to the Court by the Attorney-General, or some law officer acting under his direction.

² 271 U.S. 562, 574.

"At the hearing it was stipulated that the vessel when arrested was owned, possessed, and controlled by the Italian Government, was not connected with its naval or military forces, was employed in the carriage of merchandise for hire between Italian ports and ports in other countries, including the port of New York, and was so employed in the service and interest of the whole Italian nation as distinguished from any individual member thereof, private or official; and that the Italian Government never had consented that the vessel be seized or proceeded against by judicial process." (*Ibid.* 570.)

³ See Gardiner J. in *De Howorth v. The S.S. India*, April 5, 1921, Union of South Africa Supreme Court, Williams and Lauterpacht, *Annual Digest, 1919-1922*, Case No. 105.

Court was expressing its view of what logic required and the law appeared to ordain; it was not endeavouring to point to useful bases of accord which might, as between contracting parties, withhold from public ships engaged in commerce an exemption from the local jurisdiction. Its conclusion was in harmony with numerous decisions of the courts of other countries,¹ notwithstanding the fact that the decision contained no discussion of much foreign data that would have been illuminating both in harmony and at variance with the thought of the tribunal.

The arrival at the Virginia Capes on January 31, 1916, of the British S.S. *Appam* as a prize under the command of Lieutenant Berg of the German Navy, following its capture by the German cruiser *Moewe*, on the high seas, on January 15, 1916, resulted in a decision by the Supreme Court which was of much interest to the United States. About sixteen days after the arrival of the *Appam* in American waters, the ship was libelled by the British owners in a United States District Court, and Lieutenant Berg was cited to answer the libel. The Court entered a decree in favour of the libellant, as it did also in a suit by the master of the ship to recover possession of the cargo.² From both decrees an appeal was taken to the Supreme Court. That tribunal affirmed the decree in each case on March 6, 1917.³ The Court declared that the use made by the *Appam* of an American port was in contravention of the duty owed by a belligerent to the United States as a neutral under international law;⁴ that such use of an American port was not justified by an existing treaty with Germany; and also that an American court of admiralty possessed jurisdiction to condemn the vessel and its cargo.⁵ The conclusion that the bringing

¹ The Court cited *The Parlement Belge*, L.R. 5 P.D. 197; also, *Young v. The Scotia*, [1903] A.C. 501; *The Jassy*, [1906] P. 270; *The Gagara*, [1919] P. 95; *The Porto Alexandre*, [1920] P. 30; *The Jupiter*, [1924] P. 236.

² *The Appam*, 234 Fed. 389.

³ *The Steamship Appam*, 243 U.S. 124.

⁴ Declared the Court: "The principles of international law recognized by this Government, leaving the treaty aside, will not permit the ports of the United States to be thus used by belligerents. If such use were permitted, it would constitute of the ports of a neutral country harbours of safety into which prizes, captured by one of the belligerents, might be safely brought and indefinitely kept." (*Ibid.* 149. See also, *ibid.* 153.)

⁵ Said the Court: "The violation of American neutrality is the basis of jurisdiction, and the admiralty courts may order restitution for a violation of such neutrality. In each case, the jurisdiction and order rest upon the authority of the courts of the United States to make restitution to private owners for violations of neutrality where offending vessels are within our jurisdiction, thus vindicating our rights and obligations as a neutral people." (*Ibid.* 156.)

of a prize into an American port with a view to keeping it there indefinitely constituted a violation of the neutrality of the United States and was, therefore, to be deemed an internationally illegal act, and secondly, that an American court of admiralty might order restitution for such a violation of neutrality, even though that violation was not the proximate cause of the loss to the original owners, was regarded as of much importance. From an American point of view, the authoritative opinion of the Court that by the system of procedure existing in the United States, the judicial branch of the Government was competent to vindicate the neutrality of the nation was of special interest.¹

It has fallen to the Supreme Court to discuss the propriety of acts of American officials committed in foreign territory in pursuance of Congressional authority. By an Act of July 3, 1926, there was imposed upon an American consul in a foreign country the duty there to serve a subpoena upon a citizen of the United States or a person domiciled within its territory who might be desired as a witness in a criminal case in the United States.² In a case arising out of the application or operation of this enactment, the Supreme Court found occasion to declare in 1932, through an opinion by Chief Justice Hughes, that "the mere giving of such a notice to the citizen in the foreign country of the requirement of his government that he shall return is in no sense an invasion of any right of the foreign government; and the citizen has no standing to invoke any such supposed right".³ In the same opinion he said that it could not be doubted that the United States possessed "the power inherent in sovereignty to require the return to this country of a citizen, resident elsewhere, whenever the public interest requires it, and to penalize him in case of refusal".⁴

The cases before the Supreme Court of the United States relating to the matter of taxation have chiefly been of domestic aspect, in the sense that the solution of the questions involved, although relating to the matter of conflict of laws, have usually or frequently been determined by reference to the constitutional law of the United States. In that solution the Court has not, therefore, tested the propriety of the taxing commonwealth by possible requirements of international law. A different situation arose, however, in a case decided in 1933, where the Supreme Court adverted

¹ In his work, *International Law Chiefly as Interpreted and Applied by the United States*, Vol. II, p. 738, note 1, the writer has discussed the defects in the system of procedure existing in the United States which the decision in the case of *The Steamship Appam* reveals.

² 44 Stat. 835.

³ *Blackmer v. United States*, 284 U.S. 421, 439.

⁴ *Ibid.* 437.

to the distinction between limitations under the Constitution upon an American commonwealth in the exercise of the power to tax, and the broad authority of the Federal Government in that regard, when no constitutional question was at issue. In the instant case, the Court sustained the application of the Federal inheritance tax to certain property of a non-resident alien decedent, when that property assumed the form of bonds of foreign corporations, of foreign governments, of domestic corporations, and of a domestic municipality and stock in a foreign corporation, as well as of a balance of a cash deposit in the United States.¹ Declared Chief Justice Hughes, in the course of the opinion of the Court:

“So far as our relation to other nations is concerned, and apart from any self-imposed constitutional restriction, we cannot fail to regard the property in question as being within the jurisdiction of the United States,—that is, it was property within the reach of the power which the United States, by virtue of its sovereignty, could exercise as against other nations and their subjects without violating any established principle of international law. This view of the scope of the sovereign power in the matter of the taxation of securities physically within the territorial limits of the sovereign is sustained by high authority, and is a postulate of legislative action in other countries.”²

The decisions of the Supreme Court in cases growing out of the assertion by the United States in the course of its Civil War, of the right to capture and condemn neutral vessels and cargoes destined for the Confederate States through indirect channels as by transshipment in neutral areas, have been much commented on and frequently misunderstood. Complicated factual situations, multiplicity of grounds on which condemnation might be technically sustained, as well as the tendency of the Court to give utterance to statements relative to the law which were unnecessary to support condemnation in the particular cases, have united to produce uncertainty of mind at home and abroad concerning what was actually laid down. Thus the thinking of the Court—and in some of the cases it appeared to be thinking aloud—has at times been confused with or mistaken for its actual holdings. Without discussing the extent to which the Supreme Court in applying the principles of continuous voyage, so-called, went beyond conclusions of Lord Stowell as a prize judge, or failed to sustain propositions in support of which the decisions were cited by foreign tribunals in cases growing out of the World War, attention is here called merely to a few conclusions which seem to be warranted by

¹ *Burnet v. Brooks*, 288 U.S. 378.

² *Ibid.* 396, where the Court adverted at length to the conclusions of the House of Lords in *Winans v. Attorney-General*, [1910] A.C. 27.

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what the Supreme Court did or said. First, where the evidence satisfied the Court that it was the design of owners of contraband articles to forward the same through trans-shipment in a neutral place, to enemy territory, and that design was sought to be concealed by obvious means, the cargo was subject to condemnation even before the vessel reached the neutral place of trans-shipment.¹ Secondly, in no instance did the Court find occasion, or reveal a disposition, to condemn articles regarded as conditional contraband bound for neutral territory for trans-shipment for a bare ultimate destination in enemy territory.² Thirdly, in the cases relating to blockade, despite the presence of circumstances which appeared to justify condemnation on other grounds, there was at least one case where the conclusion of the Court seemed to necessitate a holding that the doctrine of continuous voyage was applicable and decisive;³ and numerous dicta in others revealed the judicial mind as favourable to such applicability.⁴ Fourthly, in

¹ *The Springbok*, 5 Wall. 1.

² See *The Peterhoff*, 5 Wall. 28, at 58, where Chief Justice Chase, in the course of the opinion of the Court declared: "A considerable portion of the cargo of the *Peterhoff* was of the third class, and need not be further referred to. A large portion, perhaps, was of the second class, but is not proved, as we think, to have been actually destined to belligerent use, and cannot therefore be treated as contraband." See, also, *ibid.* 59, where the Chief Justice added: "The trade of neutrals with belligerents in articles not contraband is absolutely free unless interrupted by blockade; the conveyance by neutrals to belligerents of contraband articles is always unlawful, and such articles may always be seized during transit by sea. Hence, while articles, not contraband, might be sent to Matamoras and beyond to the rebel region, where the communications were not interrupted by blockade, articles of a contraband character, destined in fact to a state in rebellion, or for the use of the rebel military forces, were liable to capture though primarily destined to Matamoras." This language does not clearly reveal the mind of the Court.

³ *The Thompson*, 3 Wall. 155, where it was held that no damages should be awarded the claimant when there was probable cause for capture for breach of blockade. The ship was captured on a return voyage from Halifax to Nassau, receiving at the latter port a cargo shipped from the blockaded port of Wilmington, North Carolina. Declared the Court: "The whole evidence tends strongly to show that the voyage from Wilmington to Halifax was a continuous one; that there was no intention to terminate it at Nassau, and that the cargo of the *Argyle* was to be reshipped with unbroken ownership and control, so that it could be taken to a port which furnished a better market. If such was the intention, when the cargo left Wilmington, then its status is fixed, and the original guilt continued to the time of the capture, notwithstanding the stoppage at an intermediate port, and trans-shipment." (*Ibid.* 163-4.) See, also, *The Pearl*, 5 Wall. 574.

⁴ Declared the Supreme Court in a dictum through Chief Justice Chase in the case of *The Bermuda*, 3 Wall. 514, at 558: "It is quite clear to us that the voyage, begun at Liverpool with intent to violate the blockade, delayed at St. George's for instructions from that firm, continued toward Nassau with the purpose of completion from that port to a rebel port, either by the *Bermuda* herself or by trans-shipment, was one voyage from Liverpool to a blockaded port; and that the liability to condemnation for attempted

no instance was there any intimation that the Court felt that the doctrine of continuous voyage was applicable to a situation where inland transportation through neutral territory was the mode of conveyance to be utilized in forwarding non-contraband articles to hostile territory of which the coast was blockaded.¹

In cases arising out of a variety of miscellaneous matters, the Supreme Court has from time to time found occasion to consider and to declare what in its opinion the law of nations permitted or forbade. Thus it has perceived and adverted to the normal inapplicability of the local statutory law to acts committed in foreign territory.² Yet it has also adverted to the propriety of American enactments purporting to penalize persons committing acts abroad which were deemed to be subversive of the defensive rights of the United States;³ and it has acknowledged the reasonableness of the exercise of jurisdiction over individuals charged with the commission of offences on board of American vessels when in foreign territorial waters.⁴ Again, the Court has manifested deference for the right of a foreign territorial sovereign to have the legality of its own conduct within its own domain unchallenged by the tribunals of the United States.⁵

In relation to the recognition of new governments, the Court has declared that:

"It is the result of the interpretation by this court of the principles of international law that when a government which originates in revolution or revolt

breach of blockade was, by sailing with such purpose, fastened on the ship as firmly as it would have been by proof of intent that the cargo should be transported by the *Bermuda* herself to a blockaded port."

The writer acknowledges his indebtedness to an unpublished memorandum prepared by his son, James Nevins Hyde, in 1934 on "The Law of Blockade—The Influence of Lord Stowell on the Supreme Court in the Civil War Cases".

¹ See *The Peterhoff*, 5 Wall. 28, 57.

² See *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357, where it was held that the prohibitions of the Sherman Anti-Trust Law of July 2, 1890, were not applicable to acts done in foreign countries by citizens of the United States. In the course of the opinion of the Court, Mr. Justice Holmes declared: "In the case of the present statute, the improbability of the United States attempting to make acts done in Panama or Costa Rica criminal is obvious, yet the law begins by making criminal the acts for which it gives a right to sue. We think it entirely plain that what the defendant did in Panama or Costa Rica is not within the scope of the statute so far as the present suit is concerned."

³ See *United States v. Bowman*, 260 U.S. 94, 98; also, *Ford v. United States*, 273 U.S. 593, 624.

⁴ See *Unites v. Flores*, 289 U.S. 137, 155-6.

⁵ See *Underhill v. Hernandez*, 168 U.S. 250, where Chief Justice Fuller declared on behalf of the Court: "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." (*Ibid.* 252.)

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is recognized by the political department of our government as the *de jure* government of the country in which it is established, such recognition is retroactive in effect and validates all the actions and conduct of the government so recognized from the commencement of its existence.”¹

One may well doubt whether international law as such prescribes the rule of retroactivity as thus laid down.² The failure of a state to determine the time when recognition of the government of another is to be deemed to take effect, may be regarded by the courts of the former as an authoritative token of design by the political department of the government that recognition is to be regarded as retroactive in effect. Such a conclusion, even if correct, is to be attributed in such case to that design rather than to a rule of international law. Yet the persistence of governments, such as that of the United States, aware of holdings such as that attributable to the Supreme Court, in proceeding to recognize new governments as such without referring to the matter of retroactivity, and without intimation that such holdings do not reflect the requirements of international law, may ultimately serve to incorporate the rule of retroactivity therein.

In 1898, the Supreme Court was confronted with the question whether a child born in the United States, of parents of Chinese descent, who, at the time of his birth, were subjects of the Emperor of China, but had a domicil and residence within the United States and were there carrying on business, and were not employed in any diplomatic or official capacity under the Emperor of China, became at the time of his birth a citizen of the United States by virtue of the first clause of the Fourteenth Amendment of the Constitution which declared that “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside”.³ After careful examination of the common law as reflected in *Calvin's* case, and later decisions, both British and American, and other relevant data indicative of foreign opinion, Mr. Justice Gray declared in behalf of the Court:

“There is, therefore, little ground for the theory that, at the time of the adoption of the Fourteenth Amendment of the Constitution of the United States, there was any settled and definite rule of international law, generally recognized

¹ *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302, where the opinion of a unanimous court was given through Mr. Justice Clarke.

² See J. B. Moore, “The New Isolation”, *American Journal of International Law*, Vol. XXVII, p. 607, where, at p. 618, the conclusions of the Supreme Court were vigorously criticized.

³ *United States v. Wong Kim Ark*, 169 U.S. 649.

by civilized nations, inconsistent with the ancient rule of citizenship by birth within the dominion.”¹

In being able affirmatively to answer the question stated above, the Court found itself unembarrassed by an assertion by its sovereign which was to be deemed at variance with any international obligation on the part of the United States.

The Supreme Court has been unceasingly aware of the fact that when the United States came into being as a new and independent state, it possessed all of the attributes of sovereignty that were to be ascribed to such an entity.² Moreover, in a variety of cases, it has found occasion to refer to certain forms of conduct which were, in its opinion, to be regarded as the normal incidents of the privilege of political independence. Thus, it has declared to be “an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe”.³ Again, it has said that the right to exclude or expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, is “an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare”.⁴ Still again, its members have declared that “by the general principles of the law of nations every government which is sovereign within its sphere of action possesses as an inherent attribute the power to acquire territory by discovery, by agreement or treaty, and by conquest”.⁵ The Court has repeatedly adverted to the broad capacity of a state, and in particular to that of the United States, to embark upon treaty-making and to do so after the adoption of the Constitution.⁶

On December 21, 1936, the Supreme Court handed down a decision containing statements of special interest to the United States, concerning its position as an entity or member of the inter-

¹ *Ibid.* 667. From the opinion of the Court, Chief Justice Fuller, with whom concurred Mr. Justice Harlan, dissented.

² See, for example, *Burnet v. Brooks*, 288 U.S. 378, at 396.

³ *Nishimura Ekiu v. United States*, 142 U.S. 651, at 659.

⁴ *Fong Yue Ting v. United States*, 149 U.S. 698, at 711.

⁵ Concurring opinion of Justices White, Shiras, and McKenna, in *Downes v. Bidwell*, 182 U.S. 244, at 300.

⁶ See *Geofroy v. Riggs*, 133 U.S. 258, 266; also, *Santovincenzo v. Egan*, 284 U.S. 30, 40.

Declared Chief Justice Hughes in the course of the opinion of the Court in *Perry v. United States*, 294 U.S. 330, at 353: “The right to make binding obligations is a competence attaching to sovereignty.”

national society when it came into being after the revolution.¹ Declared the Court, through Mr. Justice Sutherland:

“As a result of the separation from Great Britain by the colonies, acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. Even before the Declaration, the colonies were a unit in foreign affairs, acting through a common agency—namely, the Continental Congress, composed of delegates from the thirteen colonies. That agency exercised the powers of war and peace, raised an army, created a navy, and finally adopted the Declaration of Independence. Rulers come and go; governments end and forms of government change; but sovereignty survives. A political society cannot endure without a supreme will somewhere. Sovereignty is never held in suspense. When, therefore, the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union. See *Pennhallow v. Doane*, 3 Dall. 54, 80, 81, 1 L. Ed. 507, Fed. Cas. No. 10925. That fact was given practical application almost at once. The treaty of peace, made on September 3, 1783, was concluded between His Britannic Majesty and the ‘United States of America’. 8 *Stat., European Treaties*, 80. The Union existed before the Constitution, which was ordained and established among other things to form ‘a more perfect Union’.”²

Accordingly, it was said that the investment of the Federal Government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution, and that powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties “if they had never been mentioned in the Constitution, would have vested in the Federal Government as necessary concomitants of nationality”. As a member of the family of nations, the right and power of the United States in the field of foreign relations were said to be “equal to the right and power of the other members of the international family”. Otherwise, as Mr. Justice Sutherland observed, the United States was “not completely sovereign”.³

In 1929, the Supreme Court was confronted with the question

¹ *United States v. Curtiss-Wright Export Corporation*, 57 S.C.R., 216. Cf. *Rhode Island v. Massachusetts*, 12 Pet. 657, 720.

² *United States v. Curtiss-Wright Export Corporation*, 57 S.C.R., 216, at 219. These views were prefatory to a decision which held that a Presidential proclamation placing an embargo on the sale of arms to countries at war in the Chaco complied with the terms of a joint resolution of May 28, 1934, and which also sustained the constitutionality of that resolution.

³ The statehood of the entity that came into being in consequence of the revolutionary war—the United States of America—must be accepted as a fact, despite differences of opinion then prevailing as to the mode by which it could, in the absence of a Constitution, exercise the full measure of its power in relation to external relations. The adoption of the Constitution marked a successful endeavour whereby, among other things, authority to act in behalf of the state as a whole was in fact confided to a particular agency as, for example, for the making of treaties, and for other specified purposes.

whether Article III of the Jay Treaty of 1794, granting to the nationals of Great Britain and the United States the privilege of freely passing and repassing into the respective territories of the contracting parties on the continent of America, survived the War of 1812.¹ In concluding that it did not survive, the Court adverted to the fact that the privilege was not permanent in its nature, that it was wholly promissory and prospective, and necessarily ceased to operate in a state of war, since the passing and repassing of such individuals was inconsistent with a condition of hostility. The Court added that the causes, conduct, or result of the war might be such as to render a revival of the privilege inconsistent with a new or altered state of affairs, and that the grant of the privilege noted the existence of normal peaceful relations. When these were broken by war, it was said to be wholly problematic whether the ensuing peace would be of a character such as to justify the neighbourly freedom of intercourse which prevailed before the rupture.² It is believed that the decision was sound, because deference for the thought of the parties at the time of contracting, in the absence of evidence to the contrary, compels the conclusion that they must have been far from agreeing to be bound to go on with the arrangement after they might become enemies.³

The foregoing cases, representing an important fragment of relevant adjudications, may suffice to reveal the mind of the Court.⁴ They reflect its ever-present realization of the bearing of international law upon the life of the United States in its contacts with the outside world; they point to the tests of the propriety of national conduct to be found in that law; they emphasize the sense of judicial duty to apply them as occasion may require; and they reveal how the Supreme Court in its discharge of that duty endeavours to ascertain the requirements of that law and to expound its precepts.

¹ *Karnuth v. United States*, 279 U.S. 231.

² *Ibid.* 239-40.

³ Cf. *The Sophie Rickmers*, 45 F. (2) 413.

⁴ The writer has not sought to discuss numerous decisions of the Court on a variety of problems that have confronted it; he has not attempted to refer to various cases pertaining to the exercise of the agreement-making power of the United States, or to the interpretation of its treaties. The cases that have been considered are, however, deemed to be illustrative of the processes by which the Court has proceeded to act, and to reveal some conclusions which are worthy of observation.

SOME PROBLEMS OF THE SPANISH CIVIL WAR

By PROFESSOR H. A. SMITH

THIS article is written at a time¹ when the position of the war in Spain offers no early prospect either of a military decision or of a successful mediation. In order to minimize, so far as I can, the danger of these comments being out of date by the time they appear in print, I shall discuss only those matters of permanent interest which have emerged in the first nine months of the war. Upon many questions it is as yet too early to present with confidence an indisputable statement of the facts, since they are still obscured by the recriminations of the Spanish factions and their foreign partisans. These controversies must await the judgment of history, and with them I do not now propose to deal. There remain two main problems of general and permanent interest to students of the law of nations. These two problems, which perhaps are only two different aspects of the same question, may be called the problem of recognition and the problem of the application of the laws of war to the case of a civil war. In each case I shall try to value the present situation in the light of past experience, and to inquire how far the practice which we are witnessing conforms to the rules of the customary law of nations.

Upon the subject of recognition in general much confusion has been caused during the last few years owing to the enunciation of the so-called "Stimson doctrine" in 1932 and its somewhat hasty acceptance by the Assembly of the League of Nations.² Rightly considered, the recognition of a new state or other change in the world order is nothing more than the recognition of a new fact, and implies no legal or moral judgment upon the process by which that new fact has been brought about. That is the classical and the correct view. But the result of this transatlantic heresy has been to create in the popular mind—and not only in the popular mind—the impression that the grant of recognition is necessarily an act of partisanship, implying some kind of approval or support to the government recognized. There are, of course, cases where this is true, cases where recognition has been prompted by an

¹ The substance of the article was delivered in the form of a public lecture in the University of London on May 6. The exigencies of the printer have compelled us to leave it in the form prepared for oral delivery.

² For a study of the implications of the doctrine see Professor McNair's article in the 1933 volume of this *Year Book*, p. 65.

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unfriendly attitude towards the legitimate government. Of this a well-known example may be found in the French recognition of the American insurgents in 1778, a step which was merely preliminary to active French intervention in the war. In the present war the German and Italian recognition of General Franco's government on November 18 will strike most impartial observers as being clearly premature, and these decisions were probably based upon too optimistic a view of the military situation. But the examples which I have quoted are not strictly relevant to our present discussion, since they are not cases of belligerent recognition at all. In each of these cases the insurgents have been recognized, not provisionally as belligerents, but as the permanent and legitimate government of the country concerned. Premature recognition of insurgents as belligerents would also give just cause for offence to a legitimate government, but it is now beyond dispute that recognition conceded upon a proper appreciation of the existing facts is not an act of partisanship implying any hostility to the legitimate government or any encouragement to the rebels.

We can now pass on to ask two further questions. What exactly does "belligerent recognition" mean, and by what procedure is it conferred? Until a few years ago neither of these questions would have presented very much difficulty. If we now find the answer more difficult, it is because the novel doctrine which bears the name of Mr. Stimson has created a widespread impression that recognition is some kind of international reward, and non-recognition some kind of penalty or "sanction".

What we call "belligerent recognition" is not so much the recognition, even temporary and provisional, of a new government, as the recognition of the existence of a war. The existence of a war is purely a question of fact. But if we recognize the fact that a war is being carried on, then the recognition of the insurgent government follows as a necessary consequence. Wars can only be carried on by governments, and there must be at least two parties to every war. Much of the confusion which obscures the current discussion of the Spanish problem arises from a failure to observe this correct logical sequence. The opinion has become prevalent that belligerent rights can only be conceded when we have granted recognition to an insurgent government. The true doctrine is that the recognition of the insurgent government is the necessary and logical consequence of recognizing the fact of a war.

Lest this should seem to be merely a doctrinaire and theo-

retical opinion I shall try to fortify my doctrine by authority. In 1828 Dom Miguel, the pretender to the throne of Portugal, was carrying on war by sea and land against his niece and nominal fiancée, the child Queen Doña Maria, who was recognized by Great Britain and other powers as the legitimate sovereign of Portugal. At no time during the struggle was Dom Miguel ever recognized by Great Britain under any form, either *de jure* or *de facto*. In 1828 he proclaimed naval blockades of Oporto and of the Azores. These blockades were notified to the British Government, which published the notices in the *London Gazette* and communicated them to the Committee of Lloyd's. The King's Advocate, Sir Herbert Jenner, advised the British Government that the blockades, if effectively maintained, might be recognized as valid, although no form of recognition had at any time been conceded to Dom Miguel. Refusal to recognize the blockade, so Jenner advised, would be a departure from the neutrality which this country had professed in the civil war.¹

Twenty years later Palmerston's government, following the advice of Sir John Dodson, then Queen's Advocate, decided to recognize the blockade of Trieste by the Italian insurgents during the revolution of 1848, although there had been no other act of recognition of the insurgent government. Upon the point which we are now discussing Dodson's opinion is very clear.

"It is sufficient", he says, "to justify a Blockade, if duly maintained, that a *De Facto* War is carried on by Sardinia and Venice on one side and Austria on the other."²

Even more clear is the opinion of a later Queen's Advocate, Sir John Harding, when advising the government in 1860 upon the questions raised by Garibaldi's rebellion.

"If Her Majesty's Government considers that a Civil War actually exists between the 'Dictatorial Government of Southern Italy' and that of His Majesty the King of the Two Sicilies, in which Great Britain is to be strictly neutral, and that the Dictatorial Government has in fact attained (howsoever) an independent and Sovereign existence and governs 'de facto' a portion of the Neapolitan dominions, *then* Her Majesty's Government may, without violating or disregarding the law of Nations, and without encouraging 'piracy' so far recognize the acts of this 'de facto' Government, as to admit the validity of an effective Blockade, maintained by a competent Naval force acting under its orders, or to acquiesce in the capture and condemnation by it, of articles of Contraband of war designed for the use of the King of the Two Sicilies."³

In the course of the same opinion Harding pointed out that Gari-

¹ Smith, *Great Britain and the Law of Nations*, Vol. I, p. 299.

² *Ibid.*, p. 300.

³ *Ibid.*, p. 301.

baldi and his officers could not possibly be regarded as pirates, since they were carrying on war in a regular manner and had been dealt with on equal terms by British naval officers.

The three opinions which I have just cited are those of British Law Officers ranging over the period from 1828 to 1860. Let me now turn to American authority. President McKinley stated the position quite correctly in his message to Congress of December 6, 1897, dealing with the revolution in Cuba.

"In the code of nations there is no such thing as a naked recognition of belligerency unaccompanied by the assumption of international neutrality. . . . The act of recognition usually takes the form of a solemn proclamation of neutrality which recites the *de facto* condition of belligerency as its motive. . . . It assumes the international obligations of a neutral in the presence of a public state of war."¹

After explaining that the concession of belligerent rights would follow automatically from a proclamation of neutrality, he goes on to point out that in the case before him such a proclamation would be unfair as between the parties, since the Spanish Government alone possessed any naval forces, and belligerent rights would therefore operate only in favour of one side.

Even more interesting is the argument used by the Supreme Court of the United States in *The Prize Cases* during the American Civil War. The Federal Government had refused to concede any form of recognition to the Confederates and had vigorously protested against their recognition by various foreign governments. In spite of this, President Lincoln had proclaimed a blockade of the Southern States and had claimed to exercise all the usual rights of war at sea. The Supreme Court held that he was justified in so doing, on the ground that the existence of a state of war was purely a question of fact, and that belligerent rights were the consequence, not of any formal recognition, but of the existence of a state of war.

"A civil war", the Court observed, "is never solemnly declared; it becomes such by its accidents—the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war."²

¹ Moore, *Digest*, Vol. I, p. 199.

² *The Prize Cases* (1862) 2, Black, 635. The whole of this important judgment merits careful study.

SOME PROBLEMS OF THE SPANISH CIVIL WAR 21

Forty years earlier the Supreme Court, speaking through Mr. Justice Story, had laid down the same principle:

"The government of the United States has recognized the existence of a civil war between Spain and her colonies, and has avowed her determination to remain neutral between the parties. Each party is therefore deemed by us to be a belligerent nation, having, so far as concerns us, the sovereign rights of war."¹

Without further multiplying citations I will therefore summarize their effect by saying that what we recognize in these cases is the existence of war. The recognition of the insurgent government is merely incidental or consequential, since a war implies the existence of some independent authority which carries on the war.

If we can agree that this is the true meaning of belligerent recognition, we must next inquire by what method or in what forms such recognition is conceded. In the passage quoted above President McKinley was perfectly correct in saying that the law of nations knows no such thing as what he calls "a naked recognition of belligerency". When the question is one of recognizing *de jure* a permanent government, there is usually some solemn act, such as an explicit statement or the accrediting of regular diplomatic agents. But belligerent recognition is never effected by any formal or ceremonial procedure. It never constitutes a separate act by itself, but is only an inference to be drawn from conduct. Normally, but not invariably, it is an inference drawn from the act of publishing a proclamation of neutrality, and in British practice this usually means a proclamation of the provisions of the Foreign Enlistment Act. For example, Lincoln's proclamation of blockade at the beginning of the American Civil War was followed a few days later by the British proclamation of neutrality. A few words from this proclamation are perhaps worth citing:

"Whereas hostilities have unhappily commenced between the Government of the United States of America and certain states styling themselves the Confederate States of America,

"And Whereas We, being at peace with the Government of the United States, have declared Our Royal determination to maintain a strict and impartial neutrality in the contest between the said contending parties. . . ."

The proclamation then goes on to draw attention to the provisions of the Foreign Enlistment Act and warns all British subjects to refrain from serving on either side. No other form of recognition was ever conceded, and the British Government firmly refused to receive in any formal manner the diplomatic agents of the Confederates. But naval officers on the station were instructed that

¹ *The Santissima Trinidad* (1822), 7 Wheaton, 337.

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“a state of actual war” existed, and that both sides were therefore entitled to exercise belligerent rights within the limits of international law.

Similar proclamations were issued by a number of European governments, and they were defended against American protests as being nothing more than the logical consequence of the decision of the Federal Government to proclaim a blockade. But it must not be thought that even the formality of a neutrality proclamation is necessary in order to constitute belligerent recognition. No such proclamation was ever issued by Great Britain during the long civil war between Spain and her South American colonies, but it is clear that the insurgents were recognized as belligerents long before they were recognized as independent states. In the case of the Greek rebellion of 1821 the British Government had recognized the right of the Greeks to established blockades before issuing any proclamation. When a proclamation was issued (June 6, 1823) it merely drew attention in general terms to the provisions of the Foreign Enlistment Act without making explicit reference to the civil war.¹ In a word, belligerent recognition exists whenever a foreign state adopts an attitude of complete impartiality as between the contending parties and treats them, so far as the war is concerned, upon a footing of entire equality.

Two
consequences
The normal consequences of belligerent recognition may be easily stated. As soon as foreign governments have satisfied themselves that the conflict has taken on the character of a war, as distinguished from a mere civil commotion or revolutionary outbreak, then two consequences follow. In the first place, the contending parties are bound to observe all the laws of war, both in relation to their enemies and in relation to neutrals. If the war extends to the sea, they are bound to observe all the usual rules relating to such matters as blockade and contraband, and it is their duty to set up competent prize courts to protect the legitimate interests of neutral commerce. If they do all this—and the condition is important—then it will normally be the practice of neutral states to concede to both sides alike the full exercise of all belligerent rights and to submit to such interference with their commerce as the laws of war entail. In the case of the San Domingo rebellion of 1864, the Law Officers of the Crown in this country went so far as to say that it is the absolute legal duty of neutral powers, as soon as the fact of war has been established, to concede to both parties the full exercise of belligerent rights.²

¹ Smith, *op. cit.*, Vol. I, p. 288; *State Papers*, Vol. X, p. 648.

² *Ibid.*, p. 314.

For myself I think that this assertion goes too far, and to my mind the duty appears to be merely conditional. All rights are correlative to corresponding duties, and I cannot see that it is the duty of neutral powers to concede belligerent rights unless they are satisfied that the combatants are both willing and able to discharge their belligerent duties.

Let us now look at the other side of the picture. What is the position when foreign states refuse to recognize the existence of a war and decide to regard the conflict as being purely an internal disturbance? Unless their own interests are directly involved, as, for example, our interests were involved in the Egyptian rebellion of 1882, it is still the duty of foreign states to remain impartial between the contending parties and to allow the people of the disturbed country to settle their own differences in their own way. In some countries a revolution is indeed the normal method of effecting a change of government, and therefore corresponds to a general election in this country. Sometimes the two methods are combined, and a revolution is used in order to correct the result of a general election. In all such cases there is usually no need for foreign governments to take any notice whatever of the rebellion, unless and until it succeeds in displacing the legitimate government. If the rebels are successful in this, the government which they set up will probably be recognized in due course by foreign states, not as a belligerent, but as the new legitimate government. All this is now well established by practice, and in the case of the normal Latin-American revolutions the procedure followed by our own and other Foreign Offices has now become practically a matter of office routine.

The real difference between a recognized war and an unrecognized revolution is usually to be found in the treatment of neutral commerce at sea or in port. If no war is recognized, the normal relations of peace are presumed to continue between the legitimate government and foreign states. From this it will follow that foreign shipping will enjoy its normal right of innocent passage through territorial waters and is entitled to claim such access to the ports as is provided for by the commercial treaties in force. This right of access may be qualified by the right of the legitimate government to take such measures within its own territory and territorial waters as may be necessary to prevent outside assistance reaching the rebels. But any action of this kind is police action taken under the municipal law within the national territory. It is not the same thing as the establishment of a

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blockade or the capture of contraband, which are rights derived from international law and existing only in times of war. It seems equally clear that there can be no right to lay mines, even within territorial waters, unless in time of war. If mines are laid by the legitimate government in time of peace, it is a gross interference with the right of passage through territorial waters and a violation of the commercial treaties which give access to its ports. If the mines are laid by the rebels, then their act seems to be but little different from murder.

Assuming, therefore, that a state of war does not exist, there can be no belligerent rights, in the strict sense of those words, either on the high seas or within territorial waters. We may illustrate this by reference to the Brazilian rebellion of 1893, which presented a situation closely resembling that which now exists on the north coast of Spain. The legitimate government was in power on land at Rio de Janeiro, but the navy had joined the rebels and controlled the harbour. In this case the insurgents had pressed for recognition, but foreign powers refused to recognize the existence of a state of war. This decision was carried to its logical conclusion and the senior naval officers of six foreign powers, including Great Britain, sent a collective message to Admiral de Mello, the insurgent commander, informing him that they would not tolerate any interference whatever with their shipping in the harbour.¹ This action did not imply any intervention or interference in the contest between the Brazilian Government and the insurgents. It was merely an insistence that the ordinary peace-time rights of maritime commerce continued in full force so long as a state of war was not recognized. The governments of the six neutral powers quite rightly refused to draw any distinction in this respect between territorial waters and the high seas. The lawful rights of peaceful commerce were assured of the fullest protection right up to the dockside.²

Here then we see the true distinction between recognition and non-recognition. If the existence of a war is recognized, then we

¹ Moore, *Digest*, Vol. I, p. 203.

² The Law Officers of the Crown (Harding, Atherton, and Palmer) advised Lord John Russell to this effect in 1861. Commenting upon an Act of Congress which purported to close the ports of the Southern States, they observed:

"In the application of the recent Act of Congress of the United States for closing the Southern ports it will be apparent from our Report thereon that it is not to be presumed that *in the absence of an effective blockade* Her Majesty's Government would be disposed to acquiesce in the capture or confiscation, even within the territorial waters of the United States, of British vessels bound to or from Southern ports." (Record Office paper, F.O. 97/47 No. 222; opinion of September 10, 1861.)

are bound to recognize for all purposes of the war both the governments which are waging it. From this it will normally follow that both sides are entitled to exercise full belligerent rights against neutral commerce, both at sea and within their own waters, provided that they can satisfy foreign powers of their intention and their ability to wage war according to the established rules.

If, on the other hand, the existence of a war is not recognized, the consequence is that normal peace-time relations with the legitimate government continue unchanged, in so far as they are physically possible. This does not prevent foreign states from entering into informal and temporary relations with rebel authorities who may have obtained the actual control of some part of the state territory, but such intercourse should be strictly limited to what the necessities of the situation demand. So far as territorial waters are concerned, both the *de jure* and the *de facto* governments are entitled to take defensive measures within the waters adjoining the coasts which they respectively occupy, but any such action is taken entirely under the municipal law and has nothing whatever to do with belligerent rights. Neither side, for example, has the right to declare a blockade of the coasts occupied by its enemy, since the right to blockade is a right which can only be derived from a state of war.

For a proposition so elementary it should scarcely be necessary to cite authority, but perhaps it may be of interest to quote from an opinion given by the Law Officers of the Crown in 1867, when advising the government with reference to the rebellion in Crete.

"If the Ottoman Government does require from Foreign States the recognition of what is, strictly speaking, a Blockade, and not merely a right incident to every Independent State, of closing the ports of any part of its Dominions against Foreign Vessels;—if, in fact, the Ottoman Government has declared a formal Blockade, it would have no reason to complain if Foreign States simply recognized the Rebels as Belligerents; because a Blockade implies the existence of War and of two Belligerents at least, bound to respect the rights of Neutral States."¹

The same line was taken during the Carlist rebellion in Spain in 1874, and we warned the Spanish Government that the proclamation of a blockade would compel us to recognize the Carlists as belligerents. Upon receipt of this warning the Spanish Government at first postponed the application of the blockade and later abandoned the idea.²

After this somewhat lengthy introduction I now pass to

¹ Smith, *op. cit.*, Vol. I, p. 264.

² *Ibid.*, p. 321.

examine the application of these principles to the present case. Within a few hours of the outbreak of the revolt General Franco was in effective control of Morocco, the Spanish colonies, and a substantial area of continental Spain. As the war went on, the Madrid Government suffered further losses of ground, and at the time of writing much the greater part of Spanish territory is in insurgent hands. On both sides the naval forces are very weak, but the insurgents now possess, if not what we would call "the command of the sea", at least a definite naval superiority. Within their area they have organized and administer a complete system of civil government. All these facts are such as would normally justify foreign powers in deciding, if they should think fit to do so, that the contest is a war.

We have next to ask ourselves to what extent the policy of foreign states has been based upon the assumption that a war in fact exists. The result of the evidence seems to me to be clear. The existence of a war has been recognized, and by necessary consequence the insurgent government has been recognized as a belligerent by all the powers concerned. On the other hand, this recognition has not been pursued to its logical consequences, and foreign powers have not conceded to either side the exercise of belligerent rights on the high seas, although they have apparently conceded these rights within Spanish waters. Let us briefly examine the principal facts which lead to this conclusion.

So far as I am aware, no formal proclamation of neutrality has been issued in any foreign country, but a formal proclamation is not necessary, and the real question is whether a policy of neutrality has been in fact pursued. We may begin by examining the action taken at Tangier. The international statute which governs Tangier provides that the Tangier zone shall always be neutral in time of war, and the control of Tangier is entrusted to a committee composed of the principal foreign consuls. On August 8, 1936, this committee decided by a majority vote (the Spanish consul dissenting) that warships of both parties should be excluded from the harbour. They further decided that insurgents not in uniform should be admitted to the zone from Spanish Morocco, and that passports bearing the visas of the insurgent government in Morocco should be recognized as valid. Clearly these decisions, to which Great Britain is a party, amount in substance to a declaration of neutrality in the Tangier zone and to a recognition of the insurgent government for the duration of the war.

On August 9 and 10 the Madrid Government published two decrees proclaiming that the territories occupied by the insurgents were to be "considered as war zones and subject to blockade". Great Britain replied that it was impossible for her to recognize any such blockade, since the Spanish Government did not possess the naval force necessary to make it effective, and the Government of the United States replied to the same effect. If we compare these communications with the action taken during the San Domingo rebellion of 1864 and the Carlist war of 1874 we notice an important difference. On the two earlier occasions we warned Spain that the admission of a blockade would involve as a consequence the recognition of the insurgents as belligerents. In the recent case, by putting our objection upon the ground of non-effectiveness we seemed to imply that the Spanish Government had the right to declare a blockade, if they could make it effective. But, since it takes two to make a war, the consequence is that the right of blockade must have been equally conceded to the insurgents.

Law and logic would thus seem to lead to the admission of full belligerent rights on both sides. But it was quickly made clear to the Spanish Government that the exercise of belligerent rights on the high seas would not be tolerated, and when a government cruiser captured a Gibraltar steamer, the *Gibel Zerjhon* on August 26, she was compelled by H.M.S. *Codrington* to release her prize. A few days earlier Germany had taken similar action in the case of the *Kamerun*. In the more recent stages of the war the same policy has been followed towards the insurgents.

I now pass to consider what is commonly called the "Non-Intervention Agreement", which in its original form was an agreement by a number of powers to prohibit the export and carriage by their own nationals of arms and munitions to Spain. The initiative in this matter came from the French Government, and by the beginning of September the agreement had been signed by twenty-six European states. The United States did not become a party, but in January Congress agreed to impose an embargo on the export of arms and munitions to Spain. In terms of law what interpretation can we place upon the action thus taken?

If the powers concerned did not recognize the existence of a war, then the Non-Intervention Agreement was singularly misnamed. If the rebellion was no more than an internal disorder, then the agreement was a grave act of intervention in the internal affairs of Spain, for it was an attempt to prevent the Spanish

Government from obtaining the supplies which it needed for the restoration of order in its own dominions. For this reason the Spanish Government entered a vigorous protest against the agreement, and from their own point of view this protest was well-founded. If the existence of a state of war was denied, it is clear that the agreement was a highly unfriendly act towards a country which was at peace with all the powers concerned.

If, on the other hand, the existence of a war was admitted, then there can be no objection to the agreement on grounds either of law or of comity. Neutral powers are always at liberty to decide for themselves whether they will permit or whether they will prohibit the export of munitions to belligerent states, and it is obviously open to them to agree upon a common policy to be pursued in such a matter. The law of nations only demands that their decision, whatever it may be, shall be applied to both sides upon equal terms. With this essential condition the Non-Intervention Agreement fully complies, and in substance it was therefore equivalent to a collective declaration of neutrality, although presented in an unusual form. It assumed the existence of a war and recognized the insurgent government as being, for all purposes of the war, upon a footing of entire equality with the legitimate government of Spain.

Limitations of space forbid the multiplication of evidence to the same effect. Suffice it to say here that in a diversity of ways the foreign powers concerned have both denied the authority of the legitimate government and recognized the authority of the insurgent government throughout the territories which the latter controls. Other examples may be found in the enforcement of neutrality rules at Gibraltar and the British proclamation of the Foreign Enlistment Act on January 10. Particular attention may perhaps be drawn to the conclusion of a commercial agreement between Great Britain and the insurgent government in February. In describing this agreement in Parliament (February 11) Lord Templemore explained that it in no way constituted a recognition of General Franco's régime. If the question at issue were one of the *de jure* recognition of a new government this reservation would have some significance. But belligerent recognition is a matter of conduct, not of words.

In what I have said hitherto I have criticized the action of Great Britain and other powers as being in some degree illogical, but in so doing I have looked at the matter solely from a lawyer's point of view. I am aware that the political problems presented

by this war are of the greatest difficulty, and this article does not attempt to criticize the political reasons which may have compelled a departure from the ordinary course of law. Furthermore, it is necessary in fairness to point out that the belligerents themselves have not made the task of the neutral powers an easy one. Neither side, so far as I know, has set up a prize court, and it is obvious that regular prize courts are necessary to control the exercise of belligerent rights and to prevent illegal interference with neutral trade. Neither side has published any lists of contraband, so that neutrals have no means of knowing what goods they may and may not export to Spain. Each side has in turn announced its intention to "blockade" the coasts of its enemy, but in no case has there been any notification of blockade in the manner required by law. In certain areas mines seem to have been laid, but there has been no public notification of the precise area of the minefields. In a word, neither side has given to neutrals any satisfactory assurance that naval operations will be carried on within the limits prescribed by law.

I have already said that in my opinion the concession of belligerent rights is a question upon which foreign powers are entitled to exercise their discretion, and the course of events in this war has certainly shown the need for extreme caution in this matter. But what the lawyer finds difficult to understand in the present case is the clear admission of a state of war coupled with a partial concession of belligerent rights. The events of the last few weeks have shown the embarrassing results of this inconsistency. Upon the north coast of Spain the insurgents are carrying on operations which are described by them as a blockade, but which certainly do not constitute a blockade as known to the law. Great Britain has replied by declaring that the Navy will protect our shipping up to the three-mile limit, but no further. At the same time we have strongly advised the masters of these ships not to attempt to enter the Basque ports. Such a policy gives intelligible ground for complaint to both sides. The Basque Government complains that we are assisting the insurgents by advising our ships to respect the so-called blockade. The insurgents complain that our interference at sea prevents their operations from being effective. Each side, from its own point of view, is perfectly right.

Let us now briefly examine this situation in the light of legal principle, putting aside for one moment the question of recognition and assuming at least that the existence of a war has been

admitted. In war, belligerents are only entitled to capture neutral ships for certain well-defined causes—breach of blockade, carriage of contraband, and unneutral service. If a neutral ship is not guilty of any of these offences the belligerent has no right to capture it either within or without territorial waters. In addition he may have under his own municipal law the right to take certain police measures in the territorial waters washing his own coasts, but these rights have no application in enemy territorial waters. If interference cannot be justified under any of these heads the neutral ship has the right to make her voyage unmolested up to the dockside.

In the present case it is clear that there is no blockade in the legal sense of that word upon the north coast of Spain. Nor can there be any question of the carriage of contraband, since no lists of contraband have been proclaimed. Again, it is not alleged that any of the ships concerned are engaged in what the law calls unneutral service. Lastly, there can be no room for the application of police measures under municipal law, since the territorial waters of this coast belong, not to the insurgents, but to the Basques.¹ In a word, there seems to be at present no legal ground for belligerent interference with any neutral ships going to the Basque ports, and in normal circumstances it would follow that the neutral powers should protect their shipping against all forms of unlawful interference throughout the whole of the voyages.

Whatever may be the weight of the political reasons which may have prompted the present policy of the foreign powers in the Spanish War, I feel sure that in the long run logic and reason can never be disregarded with impunity. The law of nations, as we have known it hitherto, has been gradually developed by the accumulated experience and by the collective wisdom of mankind. The accepted rules which govern the attitude of foreign powers in the event of a civil war are among the fruits of this experience and this wisdom. In the past they have proved effective in confining such wars within the limits of the countries in which they have broken out. It may be that the historian of the future will be better able than we are to appreciate the value of the causes which have led to a departure from these rules in the case of the Spanish Civil War. In the light of our present knowledge I can only say that I feel grave doubts whether any temporary advan-

¹ Perhaps they belong to the Valencia Government. The constitutional relations of the three "legitimate" Governments in Spain are far from clear, but it is probably safe to say that the Basques enjoy at least "Dominion status".

tage can in the long run outweigh the harm which is done by the disregard of well-tried principles. My hope is that future lawyers will be able to regard the policy pursued in this war as an anomaly. My fear is that future politicians will regard it as a precedent.

If the present case be an anomaly, it is an anomaly which unfortunately does not stand alone. I cannot regard the Spanish Civil War in isolation from the other events of our time. To my mind it is one example of the general undermining of the principles and the authority of international law which is one of the most disquieting features of the present day. In the last twenty years the law of nations has been subjected to a severe attack from diverse quarters and for diverse reasons. The powerful support of important states has now been given to certain doctrines, such as materialism, communism, and totalitarianism, which are fundamentally in conflict with the principles of the law of nations, since these principles, both in their origin and their content, are based upon the doctrine of natural law as understood by the Christian society. It is from the countries in which these doctrines are professed that the most serious attacks upon the moral obligation of international law have been delivered. What gives real cause for alarm is that for the most part these attacks have been successful. The civil war in Spain is itself largely due to the conflict of these doctrines upon Spanish soil, and for this reason the war cannot be considered, as other civil wars have been, in isolation. It is the direct outcome of forces which, if they are undefeated, will ultimately destroy the whole basis of international order. That being so, it need not surprise us that the accepted rules relating to civil war have not been observed.

The law of nations, as it has been understood for centuries, is a law between independent states which acknowledge no earthly superior. For these reasons it does not rest upon any visible human authority and cannot be supported by physical power. Its basis, therefore, must be moral and spiritual, and such a basis presupposes some measure of agreement upon fundamental principles. Unless some such agreement upon principles can be restored, the outlook, as I see it, is dark indeed, for the structure cannot stand if the foundations are destroyed.

THE LAW OF THE DOMICIL

By J. H. C. MORRIS, M.A., Fellow and Tutor of Magdalen College, Oxford.

IN his able review¹ of English private international law during the last fifty years Dr. Cheshire has occasion to discuss the vexed question of *renvoi*. His conclusion is that the matter has been finally set at rest by the three modern cases of *Re Annesley*,² *Re Ross*,³ and *Re Askew*:⁴

"The controversy is dead. Whether the doctrine of the *renvoi* is part of English law is no longer a relevant question. It has now been decided that the expression 'law of the domicile' means the law which the sovereign of the domicile would administer in the case of the domiciled person. This method of approach entirely eliminates the question whether the doctrine of the *renvoi* is part of English law, for the view of English law on the matter cannot be relevant to the inquiry—what internal law would the foreign *lex domicilii* apply to the propositus? On the other hand the view of the foreign *lex domicilii* with regard to the doctrine is not merely relevant but decisive."

If this is really the last word of English law on the subject it would be mischievous as well as idle to reopen the controversy. But the present English attitude to the *renvoi* is capable of yielding such odd results that one may be forgiven for thinking that it is one more illustration of Dr. Cheshire's own thesis that English courts, when called upon to deal with questions of private international law, are apt to adopt some plausible principle without considering what the effect will be if it is applied to a case with slightly different facts. It is suggested that the prevailing English rule is open to serious theoretical and practical objections, and that the cases which are supposed to lay it down are not always satisfactory and are open to review. With this object let us first consider the arguments for and against the rule and then examine the rule in the light of the decided cases.

There are two observations of a general character which may be made at the outset, for they seem to lie at the root of the problem, and yet they are frequently lost sight of in discussions of this matter. First, a good deal of the difficulty which surrounds the search for the correct municipal law to apply springs from the fact that the private international law of many continental countries refers questions of succession, status, and capacity not to the *lex domicilii* but to the law of the nationality. This principle

¹ 51 L.Q.R. 76 at p. 77.

³ [1930] 1 Ch. 377.

² [1926] Ch. 692.

⁴ [1930] 2 Ch. 259.

works well enough in countries all of whose nationals live under one system of law. But it will not work in countries like the United States and the British Empire, each of which administers many different systems. Notwithstanding the Statute of Westminster and the frequent use of expressions like the British Commonwealth of Nations, it still remains true that there is only one nationality for British subjects throughout the British Empire, and consequently no such thing as a single "national" private law for the British Empire or even for Great Britain.

The second observation is that English courts must decide the question whether a man has acquired a foreign domicile solely in accordance with English principles. The question whether he has acquired a foreign domicile in accordance with the principles of the foreign law is irrelevant. This principle is of general application¹ and is not confined to cases² where the propositus has failed to comply with some such provision as Article 13 of the Code Napoléon.³

I. Arguments against the English attitude to Renvoi

1. When English private international law refers a question to the *lex domicilii* of the propositus, and the *lex domicilii* refers the question back to English law as the law of the nationality, a *circulus inextricabilis* is constituted because theoretically the series of oscillations between the foreign law and English law might be endless. In practice the difficulty is capable of solution by adopting one or other of three solutions.⁴ The first confines the reference to the foreign law to its municipal law, and thus avoids any question of a reference back. This is the solution adopted in America⁵ and approved by most American writers.⁶ It will be submitted that this solution, which is clearly the simplest, is also the most convenient and the most logical. It avoids deciding the same question twice over, and can never involve more than one crossing of the frontier in search of the correct municipal law. The second solution is for the law of the

¹ *In re Martin*, [1900] P. 211.

² e.g. *In re Annesley*, [1926] Ch. 692.

³ "L'étranger qui aura été autorisé par décret à fixer son domicile en France y jouira de tous les droits civils tant qu'il continuera d'y résider." Repealed by the French Nationality Law of August 10, 1927.

⁴ Cheshire, *Private International Law*, pp. 132-5.

⁵ *In re Tallmadge*, 181 N.Y. Supp. 336, where an American citizen with a New York domicile of origin had acquired a French domicile of choice at the date of his death. *Held* his will must be construed in accordance with French municipal law. The *renvoi* doctrine was rejected after an examination of the English and American cases.

⁶ See, e.g., Schreiber, 31 H.L.R. 523; Lorenzen, 10 C.L.R. 190, 327 and *Yale Law Journal*, Vol. XXVII, p. 509.

nationality to accept the remission back from the *lex domicilii* and apply its own municipal law. This is the solution apparently adopted in Germany¹ and in the French Cour de Cassation² but disapproved by the majority of French writers. Logically it can never involve more than two crossings of the frontier. Logically the reference back to the law of the nationality from the *lex domicilii* must be to its municipal law, and not to its private international law with a consequent further reference back, for the excellent reason that part of its law has spent itself in the first reference. The third solution is to decide the case as it would be decided by the courts of the domicil. If they would refer to English law and accept the reference back to their own law, then English courts will apply the municipal law of the domicil. But if they would decline the reference back from English law, English courts will apply English municipal law. This, it is claimed, is the modern English rule laid down by *In re Annesley*,³ *In re Ross*,⁴ and *In re Askew*.⁵ It is obvious that if the *renvoi* is a part of the law of the foreign *lex domicilii*, this third solution will involve as many as three crossings of the frontier, as actually happened in the *Annesley* and *Askew* cases. The third solution is therefore open to the initial objection that it is more complicated than either of the other two.

2. The third solution makes everything depend in the last resort on "the doubtful and conflicting evidence of foreign experts" (Maugham J. in *In re Askew*).⁶ Moreover it is peculiar to this solution that such evidence goes not merely to the foreign rules of private international law, which are usually more doubtful than those of its municipal law because less systematically provided for in the foreign code, but to the foreign view of *renvoi*, which is often the most doubtful part of its private international law. Is it not a difficult and delicate task for an English judge, trained in the English doctrine of precedent, to determine the precise weight to be attached to decided cases in a continental system of law on a point on which so much uncertainty and difference of opinion exists? Maugham J. protested against this difficulty in *In re Askew* when he said:

"I think it proper to add that in my opinion it is unsatisfactory to find that, upon the evidence adduced in the two cases of *In re Annesley* and *In re Ross*, the

¹ Article 27 of the Introductory Law of the German Civil Code.

² *L'Affaire Forgo* (Chunet, 1883, p. 64); *L'Affaire Soulié* (Chunet, 1910, p. 888).

³ [1926] Ch. 692.

⁴ [1930] 1 Ch. 377.

⁵ [1930] 2 Ch. 259.

⁶ [1930] 2 Ch. 259 at pp. 277-8.

Courts were bound to hold that, although both in France and in Italy the national law of the *de cuius* is held to prevail, yet owing to a divergence on the theoretical question of *renvoi*, the property and capacity of an Englishman domiciled in Italy is held to be a matter of (local) English law, whilst the property and capacity of an Englishman domiciled in France is held to be a matter of (local) French law. Nor is there any certainty that a contrary result will not be reached upon the evidence adduced in the next two cases which arise as to persons dying in France and Italy respectively. Those who have any acquaintance with the extensive literature that has appeared on the Continent upon the subject of *renvoi* and the great diversity of view that exists would not be surprised to find that the legal decisions in France and Italy, where legal decisions are not binding as authorities to be followed, had changed in their effect. An Englishman domiciled *de facto* in France can have no certainty that his personal law is the municipal law of France, nor can he be sure that if he crosses the frontier and becomes domiciled *de facto* in Italy that the municipal law of England will become his personal law. It may be added that views which seem strange to an English lawyer are entertained on these matters in some Eastern countries and also in some of the states of South America; and in those countries the result of acquiring a domicile must be very doubtful. I cannot refrain from expressing the opinion that it is desirable that the position of British subjects who acquire domicils in countries which do not agree with our views as to the effect of acquiring a foreign domicile should be made clear by a very short statute. There is much to be said for the 'simple and rational solution' suggested by Russell J. in *In re Annesley*:¹ but whether the municipal law of the foreign country or the municipal law of England is to be held applicable in British Courts in these cases, it is clearly desirable that the matter should be certain and should not be held ultimately to depend on the doubtful and conflicting evidence of foreign experts."

If it is difficult for a judge to decide on conflicting evidence whether *renvoi* is part of the law of a foreign country, how much more difficult is it for a solicitor or counsel to advise a client in ignorance of the expert evidence that may have been collected on the other side?

3. Another grave objection to the English attitude is that it tends to stultify English private international law. The discussion of *renvoi* in Dr. Cheshire's book is to be found in the chapter on "Domicil". But it seems logically impossible to confine the doctrine to the *lex domicilii*, and indeed Luxmoore J. in *In re Ross*² applied it to the *lex situs*. If so, the result is that whenever English private international law differs from that of a country to which it refers a question involving a foreign element, the English courts surrender their own criterion in favour of that of the foreign country. The formula "Decide the case as it would be decided by the courts of the foreign country" seems to involve the result that whenever a difference exists between the English and the foreign

¹ *Infra*, pp. 40-1.

² [1930] 1 Ch. 377.

private international law it must be resolved by applying the foreign system.

"The English court repudiates its rules directly a foreign judge is pleased to be displeased with them, and a foreign law which is called as a witness is allowed to sit as a Court of Appeal."¹

If this is really the attitude of English law, it may well be wondered why we have a system of private international law at all; for, to adapt the Abbé Sieyès's celebrated remark about Second Chambers, if our rule disagrees with the foreign rule it is mischievous, and if it agrees with it it is unnecessary.

4. A still more serious objection to the English doctrine is that it introduces all the practical disadvantages of nationality as a test of personal rights. Whenever the foreign *lex domicilii* of a British subject invokes the law of the nationality many difficult problems are raised. What is the "national law" of a British subject? It cannot be his *lex domicilii* at the time the question is raised, because *ex hypothesi* that is the law of the foreign country.² Nor can it be English law merely because England is the dominant country in the British Empire. Such a mode of reasoning is hopelessly out of date and would lead to the ludicrous result of applying English law as the personal law of a Boer, a Moslem, or a Hindu. It might be the law of that part of the British Empire in which he last had a domicile. But the object of referring questions of personal status to the *lex domicilii* surely is to apply that system of law with which the *de cuius* may be expected to be most familiar. But if he abandoned his last British domicile early in life the present assumption might easily attribute to him a system of law which he had discarded half a century before his death, as actually happened in *In re Johnson*.³ And what if he never had a domicile in the British Empire? The only other plausible alternative is that it is the law of his domicile of origin. It seems to have been assumed that this is so in each of the three modern cases, though no reasons are given.⁴ But this solution is open to the same objection as the last if the *de cuius* abandoned his domicile of origin early in life. Moreover, if his domicile of origin was in a foreign country the court would be driven to the absurdity of

¹ Bate, *Notes on the Doctrine of renvoi*, p. 114.

² Yet Westlake says there is no possible alternative to this: *Private International Law*, p. 27. If he is right he stultifies his own theory of *renvoi*, since in the majority of cases the only remission would be from the foreign law to itself.

³ [1903] 1 Ch. 821.

⁴ Farwell J. also comes to this conclusion in *In re Johnson*, [1903] 1 Ch. 821. But his reasons will not bear examination for a moment. I discuss them in detail below at pp. 45-8.

applying, say, Italian law as the "national law" of a British subject! This difficulty is keenly felt in America, where the solution reached is, it is submitted, the only possible one for a country embracing many systems of law under one allegiance.

5. The first solution of the *renvoi* problem can never involve a *circulus inextricabilis*. Nor can the second if we assume that the private international law of the first country is exhausted by the remission to the second. But the third can in one case result in a logical impasse from which it seems there is no escape. Suppose a foreign country, Utopia, has exactly the same *renvoi* doctrine as England, but takes nationality as the test of personal rights. Suppose further that a British subject dies domiciled in Utopia intestate leaving movable property in England and Utopia. The English judge refers to Utopian law as the *lex domicilii*, the Utopian law refers to English law as the (supposed) national law. The English judge thereupon inquires, how would a Utopian judge decide the case? But the only answer he receives is, exactly as an English judge would! The result is a deadlock with no solution possible at all unless the English judge applies the municipal law of Utopia in the first instance.

"English law neither refuses nor accepts the *renvoi*. It has no theory or principle on the subject at all. It is so astute or so lazy as to defer, in this interesting juridical problem, to the views of the foreign Courts. This practice will always work, and there will be no *circulus inextricabilis*, unless, which seems unlikely, a foreign law is found which is equally deferential."¹

But (a) if such a foreign law is found, the English system is no longer workable as regards that country at least; (b) if it is not found, is not that further proof of the isolated unsoundness of the English theory?

II. Arguments in favour of the English attitude

These are serious objections; now let us see what compensating advantages are claimed for the English view.

1. It is often said that the function of private international law is to protect in England rights which have been acquired abroad. Therefore if a man acquires a foreign domicile he attracts to himself the law of the foreign country, including its rules of private international law, and if by that law his rights are to be determined by English law a refusal to recognize that fact in England would deprive him of rights which he had acquired abroad by

¹ *British Year Book of International Law*, 1931, p. 175. Cf. Cheshire, *Private International Law*, p. 141.

reason of his foreign domicile. This argument is also used to justify "classification" in accordance with the principles of the foreign law instead of in accordance with those of the internal law of the country whose courts are called upon to classify.¹ But though it may be useful to state as a general proposition that the function of private international law is to protect foreign-acquired rights, it is only a general proposition and cannot be universally applied in such a crude form. It is not true that if a man acquires a right in a foreign country the English courts are bound to enforce it in England without question. To take only a few obvious illustrations, the foreigner who sues on a foreign judgment which is contrary to English ideas of public policy or of natural justice, the Maltese girl who seeks to enforce a judgment for the perpetual maintenance of her illegitimate child,² the son of an Italian testator who happened to die domiciled in England having willed his property to a stranger, the conseil judiciaire appointed in France to control the property of a French prodigal,³ have all acquired rights that are perfectly valid in their own countries; but those rights will not be enforced by English courts. It may be wondered whether the arguments which preclude an English court from recognizing the authority of a French conseil judiciaire are any stronger than those which have been advanced against the English attitude to *renvoi*.

2. It is often said that the English doctrine at least secures that English and foreign courts will arrive at the same conclusion in the same case in matters relating, say, to succession. This would be a big advantage if it were true. But is it true? It is submitted not. Cases are easily imaginable in which a different result will be reached even on the present deferential English attitude. Suppose a man dies intestate domiciled in France in the English sense and in England in the French sense, leaving movable property in France and England, and that by French law intestate succession is governed by the *lex domicilii*. It is settled beyond all doubt that an English court must determine the domicile of the deceased solely in accordance with English principles. There is no room for a discussion of the question what was his domicile according to French law, and therefore no justification for any reference from French to English law. It is clear therefore that even if the French courts would decide otherwise, the English courts must regulate the succession in accordance with French municipal law. Those

¹ See an article by W. E. Beckett in *British Year Book of International Law*, 1934, p. 75.

² *In re Macartney*, [1921] 1 Ch. 522.

³ *Re Selof's Trusts*, [1902] 1 Ch. 488.

who adopt the well-known desistement theory of Westlake would no doubt argue that it is wrong to apply the *lex domicilii* in the teeth of that law: but this is exactly what English courts do when they decide that a man is domiciled in a foreign country in spite of the fact that by the law of that country he is domiciled in England. Again, suppose an Italian subject dies domiciled in England and that Italian law refers the succession to the law of the nationality. The English courts will distribute in accordance with English municipal law, the Italian courts in accordance with Italian municipal law. The real solution for these cases of conflict seems to lie in international agreement for the standardization of rules of private international law, not in one country voluntarily and sometimes vainly surrendering its own criterion.

III. *The decided cases*

It would require a considerable weight of authority to make us believe that such an unsatisfactory doctrine is really part of English law. Nor must we forget that for every case which lends the doctrine some support there are hundreds in which the municipal law of the foreign country was automatically applied.¹ Very few of the cases which are so often referred to are really decisive. Of the three modern ones *In re Annesley*² and *In re Askew*³ would have been decided in exactly the same way if the court had applied the foreign municipal law in the first instance, while *In re Ross*⁴ would have been decided differently.

In *In re Annesley*⁵ the question turned on the material validity of a will made by a British subject of English domicile of origin who had lived most of her life in France, without having obtained an authorization from the French Government to establish her domicile there as required by Article 13 of the Code Napoléon.⁶ Russell J. decided first that the testatrix died domiciled in France in the English sense and that it was immaterial to consider the fact that her failure to comply with Article 13 precluded her from acquiring a French domicile in the French sense. The question remained, what French law ought to be applied to the will? Russell J. put the case in this way:⁷

"I accordingly decide that the domicile of the testatrix at the date of her death was French. French law accordingly applies, but the question remains:

¹ Some of these may perhaps be explained away on the ground that the English and foreign private international law concurred in referring the question to the foreign municipal law; but hardly all.

² [1926] Ch. 692.

³ [1930] 2 Ch. 259.

⁴ [1930] 1 Ch. 377.

⁵ [1926] Ch. 692.

⁶ *Ante*, p. 33.

⁷ At pp. 706-7.

what French law? According to French municipal law,¹ the law applicable in the case of a foreigner not legally domiciled in France is the law of that person's nationality, in this case British. But the law of that nationality² refers the question back to French law, the law of the domicile, and the question arises will the French law accept this reference back, or *renvoi*, and apply French municipal law?"

Russell J. then considered the evidence of French law, paying particular and possibly exaggerated attention to the two decisions of the Cour de Cassation in the *Forgo* case³ and the *Soulié* case,⁴ and decided that it would accept the *renvoi*. He thereupon applied French municipal law.

It has been doubted whether the learned judge correctly stated the effect of the French private international law. That law referred the material validity of the will to English law, not because English law was the law of the nationality, but because it was in French eyes the law of the domicile.⁵ But Russell J. had already devoted a large part of his judgment towards deciding that the French view of the testatrix's domicile had no relevance in an English court. Consequently there ought to have been no reference to English law at all, and the case ought to have been decided as it would have been decided by a French judge, *on the footing that the domicile of the testatrix was French*. Russell J. seems to have fallen into the logical error of setting up for reconsideration that French view of the testatrix's domicile which he had already decided was irrelevant.⁶ His decision that the testatrix was domiciled in France destroyed all foundation for a reference from French to English law, because that reference could only be based on the testatrix's English domicile and not on her British nationality. The fact is that one half of *In re Annesley* is inconsistent with the other.

At the end of his judgment Russell J. made the following suggestion:⁷

"Speaking for myself, I should like to reach the same conclusion by a much more direct route along which no question of *renvoi* need be encountered at all.

¹ *Sic* in the Law Reports and also in 95 L.J. Ch. 410, 135 L.T. 513, and 42 T.L.R. 586. Evidently French private international law was intended.

² Observe the unconscious assumption that the "national law" of British subjects is English law.

³ *Chunet*, 1883, p. 64.

⁴ *Ibid.*, 1910, p. 888.

⁵ Pillet, *Traité Pratique de Droit International Privé*, Vol. II, p. 617; Niboyet, *Manuel de Droit International Privé*, 1928, s. 733; Dr. Schoch in Appendix to Cheshire's *Private International Law*; Lorenzen in *Yale Law Journal*, Vol. XXXVI, p. 731, "French rules of Conflict of Laws".

⁶ Falconbridge in *L.Q.R.*, Vol. XLVII, pp. 280-1; cf. Abbot in *L.Q.R.*, Vol. XXIV, p. 137.

⁷ At pp. 708-9.

When the law of England requires that the personal estate of a British subject who dies domiciled, according to the requirements of English law, in a foreign country shall be administered in accordance with the law of that country, why should not this mean in accordance with the law which that country would apply, not to the *propositus*, but to its own nationals legally domiciled there?"

Why not indeed? No reasons are adduced against this conclusion, and one good reason—*In re Tallmadge*¹—is adduced in its favour.

"This appears to me a simple and rational solution which avoids altogether that endless oscillation which would otherwise result from the law of the country of nationality invoking the law of the country of domicile, while the law of the country of domicile in turn invokes the law of the country of nationality."²

The question in *In re Askew*³ was whether Margarete Askew had been legitimated by the subsequent marriage of her parents. The Legitimacy Act, 1926, was inapplicable because her father was married to some one other than her mother at the date of her birth.⁴ Recourse was therefore had to the old common law rule⁵ which refers to the law of the father's domicile at the date of the birth as well as at the date of the subsequent marriage. At both these critical dates her father was a British subject domiciled in Germany. If German municipal law applied she was clearly legitimate because it recognizes *legitimatio per subsequens matrimonium*. Maugham J., however, held that the "law of the father's domicile" meant that law in its wider sense including its private international law, which invoked the law of the nationality. But the evidence was clear that the German court would have accepted the remission back from English law. Maugham J. therefore decided that German municipal law was applicable and that Margarete was legitimate. The result would have been the same if he had applied German municipal law in the first instance.⁶ The case is therefore no more a decisive rejection of the "simple and rational solution" than was *In re Annesley*. In fact both Russell J. and Maugham J. would obviously have preferred to

¹ 181 N.Y. Supp. 336.

² Some American writers, citing only this part of the judgment, appear to think that *In re Annesley* "squarely rejects" the *renvoi* doctrine: *Yale Law Journal*, Vol. XXXVI, pp. 116, 736.

³ [1930] 2 Ch. 259; followed without argument in *Collins v. A.-G.*, 145 L.T. 551.

⁴ See s. 1 (2).

⁵ *Udny v. Udny*, L.R. I Sc. and Div. 441; *In re Grove*, 40 Ch.D. 216.

⁶ Dr. Cheshire denies that this is so on the ground that German municipal law recognizes *legitimatio per subsequens matrimonium* only for German nationals but does not provide for the case where the father is a foreigner: *Private International Law*, pp. 140-1. But according to the "simple and rational solution", the reference to the foreign law is to the law which the foreign country would apply "*not to the propositus, but to its own nationals legally domiciled there*".

adopt that solution had they not felt bound by authority to decide otherwise.

In *In re Ross*¹ the question turned on the validity of the will of a British subject who died domiciled in Italy. Luxmoore J. referred to Italian law as the law of the domicile and, finding that Italian law would have referred to English law as the law of the nationality and would have declined the reference back, he applied English municipal law. This conclusion necessarily involved the rejection of Russell J.'s "simple and rational solution", and Luxmoore J. was at pains to show that Russell J.'s dictum was inconsistent with the decided cases. His is the only clear-cut decision which squarely rejects the simple solution. The learned judge carefully reviewed nearly all the decided cases on the subject, and it would be churlish to question his interpretation of them had not Maugham J. in *In re Askew*² expressly guarded himself against being taken to agree with that interpretation. It is submitted that the cases on which Luxmoore J. relied may be grouped without too much dogmatism into four classes: (1) those which did not turn on *renvoi* at all;³ (2) those which were too shortly reported for any clear principle to be extracted from them;⁴ (3) those which were wrongly decided and subsequently

¹ [1930] 1 Ch. 377.

² [1930] 2 Ch. 259 at p. 274.

³ *Maltass v. Maltass*, 1 Robertson 67; *In the goods of Luigi Bianchi*, 3 Sw. & Tr. 16; *In re Trufort*, 36 Ch. D. 600 (a case of *res judicata*); *Abd-ul-Messih v. Farra*, 13 App. Cas. 431.

⁴ *Frere v. Frere* (1847), N.C. 593 (where no reasons were given), *In the goods of Lacroix*, 2 P.D. 94. The latter case "merely shows how accommodating a judge will sometimes be rather than declare a will to be void in point of form" (Pawley Bate, *Renvoi*, pp. 108-9). A naturalized British subject made a will in France in the English form disposing of his English property, and another holograph will in France in the French form disposing of his French property. He died in France but it is uncertain what his domicile was at material times; the court "inferred" that it was French. On a motion *ex parte* to allow both wills to probate evidence by a French advocate was given that (1) the English will would be upheld by the French courts as the will of a British subject made in accordance with the law of his nationality; (2) the French will was valid by French municipal law. Hannen P. ordered the case to stand over for such further evidence as he directed, and intimated that if it was forthcoming it would be "open to the applicant to contend, and I think successfully, that all the documents referred to" were valid. But when the further evidence was produced the report simply states that the President granted probate of the English will; it does not state what his conclusion was as to the French will. But if the French will was admitted to probate (and the learned President's language suggests that it was) it must have been on the ground that it complied with the municipal law of the *lex actus* or the *lex domicilii* without reference to its private international law, because the evidence was that its private international law referred to English law. If so, the court must have referred to the whole law of the *lex actus* for the English will and to its municipal law only for the French will. It is obviously unsafe to argue either way from such a case.

disapproved;¹ (4) those which seem rather to support the contrary conclusion.² The really crucial cases are only four, *Collier v. Rivaz*,¹ *Bremer v. Freeman*,² *Hamilton v. Dallas*,² and *In re Johnson*.¹ Let us examine these cases in greater detail in order to see to what extent they support the conclusion reached in *In re Ross*.

(a) *Collier v. Rivaz*.³ This is an important case because the judgment is the first to apply the famous formula that the court must imagine itself as sitting in the foreign country. A British subject died in Brussels in 1829 having acquired a Belgian domicile in the English sense. He had not, however, obtained an authorization from the Government as required by Article 13 of the Code Napoléon, which was in force in Belgium from 1815 to 1830. He left testamentary instruments, some of which were not executed in the form required by Belgian municipal law, though they were valid by English municipal law. It was proved that the validity of the testamentary instruments of foreigners who had not complied with Article 13 would be determined in Belgium by the law of their own country. Sir Herbert Jenner held that the English court must determine the question as the Belgian courts would, that therefore English municipal law applied and probate must be decreed. Luxmoore J. in *In re Ross*⁴ claims that:

“the result in *Collier v. Rivaz* could not have been arrived at if the English court had refused to take into account the rules of private international law applied by and recognized in the Belgian courts, and had merely applied the ordinary local law of Belgium applicable to Belgian nationals.”

But before we accept the learned Judge's conclusion three observations may fairly be made. First, it is very doubtful whether the Belgian experts made any clear distinction between nationality and domicile, and whether the reference back to English law was based on British nationality or on an English domicile in the Belgian sense. If it was based on an English domicile the reasoning is vitiated by the same fallacy as *In re Annesley*.⁵ Secondly, the testator's domicile of origin was Irish, and it seems to have been assumed that by this “national law” was meant either English law or, what in this case was the same thing, Irish law. We have already seen that both these assumptions are open to question. If his domicile of origin had been Scotch or Prussian

¹ *Collier v. Rivaz*, 2 Curt. 855; *In re Johnson*, [1903] 1 Ch. 821.

² *Bremer v. Freeman*, 10 Moo. P.C. 306; *Hamilton v. Dallas*, 1 Ch. Div. 257.

³ 2 Curt. 855.

⁴ [1930] 1 Ch. 377 at pp. 391–2.

⁵ *Ante*, pp. 39–41; Lorenzen in *L.Q.R.*, Vol. XLVI, at pp. 478–9. For another very interesting criticism of *Collier v. Rivaz*, see Abbot in *L.Q.R.*, Vol. XXIV, p. 143.

the decision would not perhaps have been so simple. Thirdly, a fact which seems to have escaped the notice of some advocates of the English *renvoi* doctrine is that *Collier v. Rivaz* was virtually overruled by the decision of the Privy Council in *Bremer v. Freeman*.¹

(b) *Bremer v. Freeman* is one of the very few cases on *renvoi* of appellate authority. The question was the validity of a will made in the English form by a British subject domiciled *de facto* in France who had not complied with Article 13. The case was very fully argued on both sides, the arguments turning not on *renvoi* but on whether the testatrix had acquired a French domicile. On this point the evidence of the French experts was "very unsatisfactory, confused and conflicting".² The Privy Council held (1) that the testatrix had acquired a French domicile, compliance with Article 13 not being necessary for the purpose of her capacity to make a French will; (2) that the will not having been executed in the form required by French municipal law was invalid. *Collier v. Rivaz* was questioned.

"The case was not regularly contested, which makes it of less authority. It was a mere question on the parol evidence of the Belgian law, which was very short and unsatisfactory. Their Lordships have referred to the depositions and doubt whether the learned Judge was warranted by the evidence contained in them in coming to the conclusion which he did. In this case the evidence on both sides is very full, and leads to a different conclusion."³

This case has been claimed as a decisive authority both for and against the *renvoi* doctrine.⁴ At first sight it provides the exponents of that doctrine with some promising material. Thus Jethro Brown asks: "If the court . . . had not considered itself bound, in referring to French law, to refer to that law in the wider sense, why should it have entered into an elaborate discussion of the French law of domicile?" The answer seems to be that in 1857 it had not yet been clearly laid down that the question whether a man has acquired a foreign domicile must be decided by an English court solely in accordance with English principles. The judgment of the Privy Council proceeded upon the assumption that the French view of the testatrix's domicile was a material (though not a decisive) element in the English inquiry into the same question. The long examination of French law was therefore

¹ (1857), 10 Moo. P.C. 306.

² Per Lord Wensleydale at p. 362.

³ At p. 374.

⁴ For the *renvoi*: Jethro Brown, "*In re Johnson*", *L.Q.R.*, Vol. XXV, pp. 149-50; against, Abbot, "Is the *renvoi* a part of the Common Law?" *L.Q.R.*, Vol. XXIV, p. 144.

intended to provide an answer to the question, Where did the testatrix die domiciled according to French law? and not to the question, Would the French courts apply English municipal law in this case? If the Privy Council had decided that according to French law the testatrix died domiciled in England so far as her capacity to make a French will was concerned, it would have applied English municipal law, not because it was invoked by the law of the testatrix's domicile or nationality, but because one of the supposed requirements of her French domicile was lacking and therefore she died domiciled in England in the English as well as in the French sense. It is submitted therefore that this case is a direct authority for the proposition that English law means by "the law of the domicile" the municipal law only of the foreign country.

(c) *Hamilton v. Dallas*¹ does not seem to have been a case of *renvoi* at all and it is submitted that the judgment contains no justification for Luxmoore J.'s statement² that the court acted on the rule that the whole law of the foreign country must be considered when a question of succession is referred to it. On the contrary the court seems to have automatically applied the foreign municipal law in the first instance. A British subject died partly intestate domiciled in France in the English sense without having complied with Article 13, and the question was whether the English or the French Statutes of Distribution were to regulate the succession. Bacon V.C. decided that he died domiciled in France and that the French statutes must apply.³ The case is for present purposes on all fours with *Bremer v. Freeman*.

(d) *In re Johnson*⁴ has occasioned an almost unanimous chorus of unfavourable comment.⁵ A British subject whose domicile of origin was Maltese died domiciled in Baden. She left a will which failed to dispose completely of her movable property in England and Baden. By Baden law the law of the nationality governed the intestate succession to unnaturalized foreigners. No counsel engaged in the case was concerned to argue that Baden municipal law governed the succession; the whole argument turned on whether Maltese or English law was applicable. The argument for English law was that the domiciliary law having referred back

¹ 1 Ch. Div. 257.

² [1930] 1 Ch. 377 at p. 395.

³ In discussing this case in *In re Tallmadge*, 181 N.Y. Supp. 336 at p. 347, the American judge Winthrop makes the following cynical comment: "The case has additional weight by reason of the fact that the decision deprived the English revenue authorities of legacy duty." Shades of George III!

⁴ [1903] 1 Ch. 821.

⁵ With the significant exception of Westlake, *Private International Law*, pp. 37-8.

to "British" law as the law of the nationality, "British" law meant the law of England as the dominant country in the British Empire. The argument for Maltese law was that since the domiciliary law referred back to "British" law, and since there was no such thing as "British" law as such, the whole question was at large, and therefore Maltese law as the law of the domicile of origin must necessarily govern. All parties therefore virtually *admitted* the validity of the reference back from Baden law. Farwell J. decided in favour of Maltese law on the ground that as the law of Baden ignored the testatrix's domicile in that country, she had in effect failed to acquire a Baden domicile of choice, and accordingly her Maltese domicile of origin revived:

"When therefore the law of the land said to be chosen as the new domicile disregards domicile and declines to distribute in accordance therewith or treat it as of any force, *there cannot have been any change of domicile de facto*, and the case is accordingly remitted to this Court as a case where the propositus has intended but has failed to obtain an effectual domicile of choice. No change is effectual unless the factum is proved, and the factum cannot exist in a country where the law refuses to recognize it. The result is that this Court must conclude that a domicile of choice, ineffectual to create any rights and liabilities governing the distribution of movables in the country supposed to have been chosen, is for this purpose no domicile at all, and that the propositus therefore is left with his domicile of origin unaffected."¹

This line of reasoning, that an attempt to acquire a domicile of choice is defeated by the refusal of the chosen domiciliary law to recognize the new domicile, is contrary to the well-established rule² and was expressly dissented from by Russell J. when the point arose again in *In re Annesley*.^{3, 4} The important point for our purpose is that this ground for the decision involved no *renvoi* doctrine at all, for the court decided that the testatrix's domicile at the time of her death was not in Baden but in Malta, and then proceeded to apply Maltese municipal law without pausing to consider whether Maltese private international law referred back to English or to any other law.

But according to Luxmoore J. there was an alternative ground

¹ At p. 828.

² e.g. *Bremer v. Freeman* 10 Moo. P.C. 306, *Hamilton v. Dallas*, 1 Ch.D. 257, *In re Martin*, [1900] P. 211.

³ [1926] Ch. 692.

⁴ Farwell J. seems to have been led astray by the false point that the Baden courts would have repudiated the testatrix and declined jurisdiction over her. Of course it is clear that the existence of movable property in Baden would have given the Baden courts jurisdiction and would have forced them to come to some decision if the question had been raised in Baden; though whether they would have applied the *lex domicilii* is another matter.

for the decision which supports his own conclusion. The learned Judge says that this alternative ground was based on the assumption that the testatrix died domiciled in Baden, that the English court must decide the question as the Baden courts would decide it, that the Baden courts would refer to English law as the law of the nationality and discover that, by that law, Maltese law as the law of the domicile of origin was applicable. It is submitted that if Farwell J. really adopted this second ratio he was applying demonstrably fallacious reasoning. First, the learned Judge was faced with the difficulty of determining what was the "national law" of a British subject. He says "the only possible solution" is that the courts of a foreign country must necessarily refer to England as the only country in the British Empire with which it is diplomatically acquainted.

"Foreign states are in diplomatic relation with this country as representing the whole Empire. They know nothing officially of Scotland or Canada or the Colonies, still less perhaps of the Channel Islands or the Isle of Man."¹

But since 1707 they have known nothing officially of England either, because the diplomatic unit is not England but the United Kingdom. Next, Farwell J. says that inasmuch as English law distributes in accordance with the law of the domicile of origin, the reference back to the law of the nationality must mean to that law. But here he is inextricably mingling his two alleged rationes. English law only distributes in accordance with the law of the domicile of origin if it happens to be also the law of the domicile at the date of the death. But if the *de cuius* retained her Maltese domicile of origin at the date of her death, she cannot have been domiciled in Baden, and so the only basis for a reference back from Baden law disappears. The only possible justification for a reference to the law of the domicile of origin was that this was the domiciliary law of the testatrix at the time of her death; but, if so, she cannot have had a domicile in Baden at that time and the decision cannot have proceeded upon the ground that she had. Thirdly, it has been well pointed out that if the testatrix had been of French instead of British nationality Farwell J. would have had to apply Maltese municipal law on his first line of reasoning and French municipal law on his second!² Surely this prevents us taking the alleged alternative ratio too seriously.

¹ At p. 834. Now that the Dominions are separately represented in the League of Nations and sometimes maintain their own ambassadors in foreign countries, this solution is even more open to criticism than it was in 1903.

² Jethro Brown, *L.Q.R.*, Vol. XXV, p. 152; Schreiber, *H.L.R.*, Vol. XXXI, p. 557; Falconbridge, *L.Q.R.*, Vol. XLVII, p. 275.

It is surely preferable to treat the whole case as wrongly decided and none of the reasons for it as any longer supportable.¹ The decisive point is that the problem raised by *In re Johnson* is insoluble unless the law of a foreign country means its municipal law only. If a principle completely fails to provide a solution to an easily imaginable set of facts, it is surely time it was abandoned.

IV. Conclusion

It is submitted that *In re Ross*² is the only case which really supports the proposition that the "law of the domicile" means the law which the courts of the domicile would apply to the domiciled person; that that case was wrongly decided because the principle which it lays down is neither workable in practice nor warranted by the decided cases; and that it is open to a judge in the future to hold that the "law of the domicile" means its municipal law only. But unless such a case arises promptly for decision it is eminently desirable that the matter should be clarified by the "very short statute" envisaged by Maugham J. Otherwise English law will justify the despairing cry of M. Niboyet in his discussion of "*L'Affaire Forgo*": "On aboutissait vraiment à l'incohérence avec le *renvoi*."³

¹ This is the view taken by Scrutton L.J. in *Casdagli v. Casdagli*, [1918] P. 89, 109, by Russell J. in *In re Annesley*, [1926] Ch. 692, 705, and by Maugham J. in *In re Askew*, [1930] 2 Ch. 259, 272, where he says: "I think the case of *In re Johnson* and the reasons given for that decision by Farwell J. are no longer of authority." Extra-judicial writers have also condemned *In re Johnson*. Dicey, a stout supporter of the *renvoi* doctrine, subjects it to vigorous criticism (*L.Q.R.*, Vol. XIX, p. 244), though elsewhere he thinks that the decision may be supported on the second ground (*Conflict of Laws*, p. 873). Pollock at first favoured the decision (*L.Q.R.*, Vol. XIX, p. 246), but on mature consideration agreed that it could not be supported on either ground (*L.Q.R.*, Vol. XXXVI, p. 91). He thinks that Baden law ought to have been applied without regard to Baden private international law.

² [1930] 1 Ch. 377.

³ *Manuel de Droit International Privé*, s. 735, p. 851; cited *L.Q.R.*, Vol. XLVII, p. 278.

THE INFLUENCE OF HUBER'S *DE CONFLICTU LEGUM*¹ ON ENGLISH PRIVATE INTERNATIONAL LAW

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WHEN Story's *Commentaries on the Conflict of Laws* appeared in 1834 no serious attempt had been made to construct a system of Conflict of Laws on the basis of the existing English and American decisions.² Chancellor Kent states in his *Commentaries* that questions arising out of the extra-territorial operation of law "were becoming frequent and delicate topics of discussion" in American law, and he found it necessary to give a passing attention to the subject.³ But apart from Kent's brief treatment of the subject, Story found that not the slightest effort had been made "to arrange in any general order, even the more familiar maxims of the Common Law in regard to it", and that the materials for the subject were "loose and scattered, and to be gathered from many sources, not only uninviting, but absolutely repulsive to the mere student of common law".⁴

In England, the only work which had appeared on the subject was a short *Treatise on the Difference between Real and Personal Statutes*, by Jabez Henry, in 1823, but this merely repeated some of the more familiar maxims of the continental jurists on the question of real and personal statutes,⁵ and although sometimes referred to by Story, it does not appear to have had any influence on the subject.

In America, Samuel Livermore, an advocate of New Orleans,

¹ Ulrich Huber (1635-94) published his *Praelectiones Juris Romani et hodierni* in three volumes in 1689, and the chapter entitled *De Conflictu Legum* is to be found in Vol. II, Book 1, Tit. iii. The Latin text is reprinted in Guthrie's translation of Savigny's *Conflict of Laws*, 2nd ed., p. 508. It was translated by Dallas (*Dallas's Reports*, Vol. III, pp. 370, 377); and the text together with a translation and an introduction was published by Prof. Lorenzen in the *Illinois Law Review*, 1919, Vol. XIII, p. 375, and is included in a collection of essays in honour of Dean Wigmore (1919).

² Story's *Conflict of Laws* was first published in Boston in 1834, and was reprinted in Edinburgh in 1835. On Story's place in the development of *Conflict of Laws*, see Lorenzen, "Story's *Commentaries*—A Hundred Years After"; *H.L.R.*, 1934, Vol. XLVIII, p. 17; Beale, *Conflict of Laws* (1935), Vol. III, p. 1912.

³ *Commentaries*, Vol. II, 12th ed., p. 455.

⁴ *Conflict of Laws*, Pref. to 1st ed.

⁵ Henry had been President of the court of Demerara and Essequibo, and in publishing the judgment of the court of Demerara in *Odwin v. Forbes* on the effect of a foreign bankruptcy, he included his *Treatise on the Difference between Real and Personal Statutes* as a preface.

produced in 1828 his *Dissertation on the Contrariety of Laws*, in which he described and defended the theories of the statisticians. The problems which had arisen from the conflict between the civil and the common law had been discussed with great learning in the courts of Louisiana,¹ and it is, therefore, not surprising that the first American treatise on the subject was published in that state. Livermore's work has been described by a very eminent American authority as "a forceful but belated attempt to reinstate the statutory theory of the medieval commentators",² and it appears to have exercised little or no influence on Anglo-American doctrine. Livermore's permanent contribution to the science was made in another way, for by bequeathing his large collection of authorities to Harvard, where they were used by Story, he helped to found that tradition of scholarship in the Conflict of Laws, which has continued in that University to the present day.

It was left to Story to formulate a common-law system of private international law. This task he was able to achieve by relating the isolated decisions of the English and American Courts to the doctrines which had been laid down by the continental jurists. Story's work from its first appearance received the enthusiastic approval of the courts in England as well as in the United States,³ and the conclusions of the leading jurists were so fully presented there that henceforth it was seldom necessary to go to the original authorities. Although the great American commentator is, therefore, properly regarded as the founder of the common law doctrine of the Conflict of Laws, much of the material necessary for the work was already available, and it has recently been pointed out that, when Story wrote, there existed over five hundred decisions of English and American courts on the subject.⁴

¹ See, for example, the impressive judgment of the Louisiana court in *Saul v. his Creditors* (1827), 8 Martin (N.S.), 665, on the effect of a change of domicile on family property.

² Beale, *Conflict of Laws*, Vol. III, p. 1909. Story describes the work as "very able and clear"; *Commentaries*, 2nd ed., p. 13.

³ In 1835 Tindal C.J., in giving the judgment of the Common Pleas in *Huber v. Steiner*, 2 Bing. N.C. 202, speaks of the *Commentaries* as "a work which it would be unjust to mention without at the same time paying a tribute to the learning, acuteness and accuracy of its author". Again in 1839, in *Birtwhistle v. Vardell*, 7 Cl. & Fin. 895, in giving the unanimous opinion of the judges he referred to Story's "admirable *Commentaries on the Conflict of Laws*". Lord Brougham's remarks in that case and again in 1837 in *Don v. Lippmann*, 5 Cl. & Fin. 431, also show how complete was the confidence which the work inspired. That Story's authority continues to be respected was recently shown in *In Re Piracy Jure Gentium*, [1934] A.C. 586, 596, where Lord Sankey in giving the decision of the Privy Council declared that "he would be a bold lawyer to dispute the authority of so great a jurist".

⁴ Lorenzen, *H.L.R.*, 1934, Vol. XLVIII, p. 17.

It is difficult to determine when the question of the recognition of foreign laws first came to be considered in England. Kent declared that "these topics were almost unknown in the English courts prior to the time of Lord Hardwicke and Lord Mansfield".¹ This, however, does not present a complete picture of the situation. Until the rules relating to venue had been relaxed, cases involving the application of foreign law could seldom arise in the ordinary courts, and the common law originally declined jurisdiction over foreign transactions.² Such cases would fall mainly within the jurisdiction of the local mercantile courts, and later of the High Court of Admiralty. Consequently the origins of private international law in England must be sought outside the common law.³

In so far as the law merchant was regarded as a uniform law applicable to merchants everywhere, there could be no conflict of laws.⁴ On the other hand, it is known that the mercantile customs differed from place to place, and these differences must of necessity have given rise to problems of conflict. It appears that the law merchant contained provisions to meet such cases. Thus in 1303 it is stated in *Carta Mercatoria* that contracts are governed by the *lex loci contractus*.⁵ Moreover, the principle that foreign judgments should be recognized and enforced appears to have been fully established in the High Court of Admiralty.⁶

It may well be that when the law merchant came to be incor-

¹ *Commentaries*, 12th ed., Vol. II, p. 455.

² See Holdsworth, *History of English Law*, Vol. I, p. 526 *et seq.*, and Vol. V, p. 60 *et seq.*

³ Sir Leoline Jenkins, who was a judge of the High Court of Admiralty from 1665 till 1685, urged that actions relating to international commerce should remain within the jurisdiction of the Admiralty, for since "all merchants abroad make their contracts according to the maritime or civil law, the difficulties, therefore, upon such contracts should not be judged by the law that had nothing in it, either provisional or decisive in such cases": Wynne, *Life of Sir Leoline Jenkins* (1724), Vol. I, p. lxxvii.

⁴ See Holdsworth, *History of English Law*, Vol. I, p. 526 *et seq.*, and *Smith's Mercantile Law*, 17th ed. (1931), p. ccvii. In the City of London Courts, where actions on foreign transactions were common, it appears that the law merchant was generally regarded as being of a cosmopolitan character: *Select Pleas of City of London*, 1381-1412 (1932), edited by A. W. Thomas.

⁵ See Holdsworth, *History of English Law*, Vol. I, p. 543: "Et si forsan supra contractu hujusmodi contentio oriatur, fiat inde probatio vel inquisitio, secundum usum et consuetudines feriarum et villarum mercatoriarum ubi dictum contractum fieri contigerit et iniri."

⁶ Molloy states in his *De Jure Maritimo* (1676), 9th ed. (1769), p. 340, that execution of foreign judgments will be decreed by the High Court of Admiralty, and cites a case where a judgment had been executed at the request of the Governor of Friesland. Holt C.J. in *Ewer v. Jones* (1704), 2 Ld. Raym. 934, 935, declared, "the sentence of a civil law court in a foreign realm shall be executed in a Court of the same nature here".

porated into the common law, the fact that the mercantile courts had already been required to deal with the question of the application of foreign law affected the attitude of the common-law courts towards the subject. The fact remains, however, that it was on the writings of the continental jurists that the English lawyers principally relied during the eighteenth and early part of the nineteenth century for a solution of the problems of the conflict of laws. This readiness to consult the foreign jurists is illustrated in the leading case of *Pottinger v. Wightman*¹ where the question was whether a mother could change the domicil of her infant children after the death of their father. Sir Samuel Romilly in arguing the case declared that the question had not been considered in England, and that, therefore, he was compelled to base his argument on the conclusions of the foreign jurists "to whose opinions (in the absence of domestic authorities) our courts are accustomed to resort on questions which like the present must be decided rather by general principles of law than by the peculiar doctrines of any local code". It was agreed by Sir William Grant M.R. that there was so little to be found in our own law on the subject of domicil "that we are obliged to resort to the writings of foreign jurists for the decision of most of the questions that arise concerning it".²

In Holland, owing to the existence of a number of different provinces with their own laws, the problem of the conflict of laws had in the seventeenth century assumed a practical importance similar to that which it acquired in the United States before the end of the eighteenth century, and had received much attention from the Dutch jurists. It was to their works that the English courts most frequently turned when they came to be confronted with the same problems, and a very noticeable feature of the English decisions on the subject during the latter half of the eighteenth century and the first half of the nineteenth is the frequency with which the doctrines of Huber and of the Voets are cited and their conclusions followed.³

The acceptance in England of the doctrines of the Dutch jurists was facilitated by the very close relations, both mercantile

¹ (1817) 3 Mer. 67.

² *Ibid.* 79.

³ See especially *Robinson v. Bland* (1760), 2 Burr. 1077, and 1 W. Bl. 34, 256; *Holman v. Johnson* (1775), 1 Cowp. 341; *Hog v. Lashley* (1792), 6 Br. P.C. 550 n.; and 4 Paton, 581; *Pottinger v. Wightman* (*supra*); *British Linen Co. v. Drummond* (1830), 10 B. & C. 903; *De la Vega v. Vianna* (1830), 1 B. & Ad. 284; *Huber v. Steiner* (1835), 2 Bing. N.C. 202; *Don v. Lippmann* (1837), 5 Cl. & F. 1; *Leroux v. Brown* (1852), 12 C.B. 801.

and cultural, then existing between the two countries.¹ Westlake, however, suggests that the union with Scotland may have had something to do with their reception.² The frequent practice, adopted by Scottish advocates during the seventeenth and eighteenth centuries, of completing their legal studies in Holland had made them directly acquainted with the works of Huber and the Voets, and there is evidence that the subject had received greater study in Scotland than in England, as is shown by the fact that while only a small proportion of the ninety-one continental works mentioned by Story and Livermore were to be found in the law libraries of London, all except six were contained in the Library of the Faculty of Advocates at Edinburgh.³ This is also shown by the wide acquaintance with continental doctrines which Scottish appeals on matters affecting the conflict of laws reveal.⁴ If the conclusion, which will be stated later in this article, that it was Lord Mansfield who was directly responsible for making the works of the Dutch jurists on this subject known to the English courts, be correct, this goes to confirm Westlake's conjecture, since it is highly probable that it was through his knowledge of Scots law that Mansfield had acquired his familiarity with them, for although, as Dr. Johnson observed, he had been caught young, he must have been well versed in the law of his native country, for it is known that he had a large practice in Scottish appeals before the House of Lords.⁵

The work which exercised by far the greatest influence in the development of private international law in the common-law countries was the chapter by Ulrich Huber (1636–94) entitled “*De Conflictu Legum Diversarum in Diversis Imperiis*” in his *Praelectiones Juris Romani et Hodierni*, which was published in 1689.⁶

¹ It may be noted that John Voet's Commentaries were dedicated to William III. The acquaintance, at any rate, of some English lawyers with the Dutch law schools is illustrated in the case of Sir Leoline Jenkins, who had visited the Dutch universities during his exile: Wynne's *Life of Sir Leoline Jenkins* (1724), Vol. I, p. vi.

² Westlake, *Private International Law*, 17th ed., p. 8. Professor Beale's dismissal of Westlake's suggestion as “mere pedantry”, on the ground that it was through Story that Huber influenced English and American law, does not appear to take adequate account of Huber's influence before the appearance of Story's *Commentaries*—Beale, *Conflict of Laws*, Vol. III, p. 1904.

³ See Kent's *Commentaries*, 12th ed., Vol. II, p. 455. On the early development of private international law in Scotland see Gibb, *International Private Law in Scotland in the Sixteenth and Seventeenth Centuries* (1928).

⁴ See *Balfour v. Balfour* (1793), 6 Br. P.C. 500, where the leading Scottish decisions are noted.

⁵ Fifoot, *Lord Mansfield* (1936), p. 35.

⁶ *Praelectiones*, Vol. II, book I, tit. iii. Huber also dealt with the same subject in his

The unique position which Huber had come to occupy in the common-law countries may be seen from the statement of the American reporter, Cowen, in 1825. "Huberus in his title *De Conflictu Legum*", he writes, "has broken the ground most effectively, I believe, of all the European writers. . . . In truth, he is referred to as authority in almost every case where the *lex loci* has been seriously in question."¹ Kent and Story bear similar testimony. Kent declares that when the question of the conflict of laws "was first introduced in Westminster Hall, the only work which attracted attention was a tract by Huberus entitled *De Conflictu Legum*",² while Story states that Huber "had possessed an undoubted preference over other continental jurists as well in England as in America".³

It would seem that the first occasion on which the conclusions of Huber were discussed was in the case of *Robinson v. Bland* in 1760.⁴ If this is correct, this decision marks an important stage in the development of private international law in England, and the circumstances relating to it add to its interest and significance.

The action was brought to recover money won on a wager made in France, and the plaintiff argued that, as the contract was binding in France, it was enforceable here. The case for the defendant was argued by Blackstone, who admitted that regard had often been paid to foreign laws in the case of contracts made abroad, as the parties might be supposed to refer to that law, but argued that the courts would not enforce a contract which was prohibited by an English statute or the enforcement of which was contrary to public policy. He contended that gaming contracts made abroad should not be enforced in England, as our courts should "not give a sanction to this fashionable vice, nor suffer our travelling nobility and gentry to fall a more easy prey to it than they are already".⁵

De Jure Civitatis (1684), and in Dutch in 1686. The three chapters are practically identical, and the *De Conflictu Legum* is the only text generally cited. On this see the important researches of Prof. E. M. Meijers in "L'Histoire des principes fondamentaux du Droit International Privé à partir du Moyen Âge", in *Rec. des Cours*, 1934, Vol. III, at p. 654.

¹ 4 Cowen, 508, where the reporter contributed a long note on the *lex fori* and the *lex loci*.

² Kent's *Commentaries*, 12th ed., p. 454.

³ *Conflict of Laws*, s. 31.

⁴ 2 Burr. 1077; and 1 W. Bl. 234, and 256. The reports of such earlier cases as *Fcaubert v. Trust* (1702), 1 Br. P.C. 129, and *Pipon v. Pipon* (1744), Amb. 25, and 299, make no reference to the works of the jurists. In *Ex parte Burton*, 1744, 1 Atk. 255, Lord Hardwicke states that he had consulted John Voet on the Pandects, but this was merely to ascertain the effect of *cessio bonorum* in Holland, and not on any problem of conflict of laws.

⁵ 1 W. Bl. at 245.

The argument is reported at length by Blackstone in his report of the case, but the report contains no reference to any citation of foreign authorities, and the argument appears to have proceeded solely on the basis of English decisions, and to have been mainly concerned with the question whether an English statute was intended to have effect abroad.

At the end of the argument Lord Mansfield intimated that the court would like to have the case re-argued, as he considered it to be "a case of great consequence with regard to the principles upon which it should be determined". Since the present topics had been exhausted, he said he would "throw out a few hints to be spoke to the next time", and he then referred to the distinction between real and personal statutes, an observation which shows unmistakably that he had in mind the discussions of the statutists. It is evident that the English judges were not at this time familiar with these discussions, for Dennison J. declared that this case and the law upon it were quite new to him, and that he could form no opinion upon it.

When the case was re-argued the conclusions of Voet, Huber, Grotius, and Dumoulin were considered, and Lord Mansfield based his judgment mainly on the passage which he quoted from Huber's *De Conflictu Legum*. While admitting that "the general rule established *ex comitate et jure gentium* is that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract", he agreed with Huber that this could not be the case where the parties had in mind the law of another country as the law by which the contract was to be governed.¹

Fifteen years later, in *Holman v. Johnson*,² Lord Mansfield again quoted at length from the *De Conflictu Legum*, and commended Huber's doctrine.

"The doctrine Huberus lays down", he declared, "is founded in good sense, and upon general principles of justice. I entirely agree with him."³

In view of the influence exercised by Lord Mansfield both in England and in America, the respect which he had expressed for Huber's opinion was undoubtedly an important factor in bringing about the early recognition of his authority in both countries.

Another reason which caused Huber's *De Conflictu Legum* to be more used than the works of the other jurists was its greater accessibility. In 1797 it was translated by Dallas for the purpose of a case involving the conflict of laws, which he was then

¹ 1 W. Bl. at 259.

² (1775), 1 Cowp. 341.

³ *Ibid.*, at 344.

arguing before the Supreme Court of the United States. Being persuaded that it would be welcomed by the profession, he included it in his report.¹ Huber's treatise was thus made easily available for the use of the American lawyer at a time when the subject was becoming increasingly important, and when there was no English work on it which he could consult. Later on, the greater part of the *De Conflictu Legum* was textually incorporated by Story into his *Commentaries*, so that for the last hundred years private international lawyers in England and America could hardly fail to be thoroughly acquainted with his teaching.

Huber's treatment possessed a further advantage over its rivals which would be likely to commend it to the common lawyer, namely, its thoroughly practical character. Huber himself in addition to being an academic jurist had the experience of a practical lawyer,² and the *De Conflictu Legum* is not a lengthy scholastic disquisition on the distinction between real and personal statutes, but a concise manual where the subject has been reduced to a number of practical rules, the application of which is made clear by concrete illustrations.

The whole of Huber's chapter is compressed into fifteen short paragraphs, and only occupies five quarto pages, but, to quote Frederic Harrison, "they cover the ground of Private International Law and treat it according to our modern ideas", and his "treatment of the subject is distinguished by clearness, practical judgment, and a total absence of pedantry".³ The superiority of Huber's treatment in this respect was commented on in 1789 by Hargrave in the seventeenth edition of *Coke on Littleton*, where the editor informs the reader that in the *De Conflictu Legum* he will find "a very informing dissertation on the *lex loci*, and the principles by which the application of it ought to be regulated, expressed, and clearly illustrated by a variety of cases".⁴

The three following axioms, which were laid down by Huber at the beginning of his chapter, and from which he deduced his propositions, came to constitute the basis of the English doctrine regarding the conflict of laws.

1. The laws of every sovereign authority have force within the boundaries of its state, and bind all subject to it, but not beyond.

¹ *Emory v. Greenough* (1797), 3 Dallas 369, n.

² Huber was a professor in the University of Franeker, and afterwards a member of the Provincial Court in Friesland.

³ *Lectures on Jurisprudence and the Conflict of Laws* (1919), p. 118.

⁴ *Co. Litt.*, 17th ed. (1789), f. 79.

2. Those are held to be subject to a sovereign authority who are found within its boundaries, whether they be there permanently or temporarily.
3. Those who exercise sovereign authority so act from comity, that the laws of every nation having been applied within its own boundaries should retain their effect everywhere so far as they do not prejudice the powers or rights of another state, or its subjects.¹

These maxims embody the doctrine of the Dutch School that all laws are strictly territorial, so that it is only by the tacit consent of a state that a foreign law is entitled to any recognition within its boundaries. The theory of the earlier statistists, which attributed extraterritorial operation to personallaws, had become incompatible with the idea of the exclusive sovereignty of a state within its boundaries, and was clearly unacceptable by the time the foundation of a system of Conflict of Laws came to be laid in England and America.² On the other hand, the doctrine of comity expressed in Huber's third maxim provided a possible theory upon which the recognition of foreign laws could be based, and was readily accepted in both countries, with the result that the rules governing the Conflict of Laws have always been regarded as a part of their own legal systems.

The acceptance of this view is generally illustrated in the text-books by the well-known judgment of Sir William Scott in *Dalrymple v. Dalrymple* in 1811,³ but it had already been very clearly expressed by Lord Mansfield in 1775 in *Holman v. Johnson*,⁴ when he declared: "There can be no doubt but that every action tried here must be tried by the law of England; but the law of England says that in a variety of circumstances with regard to contracts legally made abroad, the law of the country where the cause of action arose shall govern."

The doctrine of comity has not met with such general acceptance among continental jurists, but it appears that the term "comity" as used by the Dutch jurists has often been misunderstood, and that there has been a tendency to interpret their doctrine as meaning that the recognition of the effect of foreign laws depends upon the mere courtesy of the state granting such recognition.⁵

¹ § 2.

² This difficulty is illustrated in *Feaubert v. Trust* (1702), Prec. Ch. 207; 1 Bro. P.C. 129, where it was argued that French refugees "could not bring over the French law here, but must now be governed by the laws of England".

³ (1811), 2 Hagg. Con. 54.

⁴ 1 Cowp. 341, at 343.

⁵ See Meijers, *Rec. des Cours*, 1934, Vol. III, at p. 656, and Arminjon, *ibid.*, 1933, Vol. II, at p. 12.

This was not Huber's meaning, for he clearly associates the *comitas gentium* with the notion of private international law as *jus gentium*, and declares that the rules of the Conflict of Laws rest upon the general interest and tacit consent of all states.¹

It was also in this sense that the doctrine was understood and accepted by Story. "The true foundation" on which the subject must rest, he declares, "is that the rules which are to govern are those which arise from mutual interest and utility; from the sense of the inconveniences which would arise from a contrary doctrine; and from a sort of moral necessity to do justice in order that justice may be done to us in return."²

The doctrine of comity, at most, only provides a theoretical foundation upon which a system of Conflict of Laws may be built. It does not by itself indicate the principles according to which the system is to be constructed. Although the Dutch School rejected the doctrine that personal statutes operated on the person everywhere, since no law could operate *ex proprio vigore* outside its own territory, the Dutch jurists generally continued to adopt the traditional classification of laws into real and personal, and to formulate their rules according to this division.³ Livermore in America and Henry in England attempted to employ the same method, but their efforts were unsuccessful, and the failure of the doctrine derived from the statutists to provide a solution to the actual problems of the Conflict of Laws was demonstrated in Louisiana in the case of *Saul v. his Creditors*.⁴ After an elaborate examination of the discussion of the continental jurists the court declared: "The moment we attempt to discover from these writers what statutes are real and what are personal, the most extraordinary confusion is presented. Their definitions often differ, and when they agree on their definitions, they disagree as to their application." As a result of this confusion the court found "the subject as much enveloped in obscurity and doubt" as it would have been if it had to be decided "without the knowledge of what others had thought and written about it".

Huber abandoned the attempt to solve the problem on the basis of the traditional classification, and the term "real and personal statutes" is not to be found in the *De Conflictu Legum*.

¹ § 1 and § 2.

² *Conflict of Laws*, s. 35. The view that the recognition of foreign law is associated with the *jus gentium* is seen in Lord Mansfield's judgment in *Robinson v. Bland*, 1 W. Bl. at 259, where he stated that the principle is "established *ex comitate et jure gentium*".

³ See Meijers, *supra*, at p. 655 *et seq.*

⁴ (1827), 8 Martin (N.S.) 665, see esp. at 676.

Instead, he laid down a theory of acquired rights, which he embodies in his third maxim:

"... the laws of every nation having been applied within its own boundaries should retain their effect everywhere, so far as they do not prejudice the powers or rights of another state, or its subjects."

He then proceeds to state the principle upon which this doctrine is founded in the following passage:

"Although the laws of one country can have no direct force in another country, yet nothing could be more inconvenient to the commerce and general intercourse of nations than that transactions valid by the law of one place should be rendered of no effect elsewhere owing to a difference in the law."¹

Huber's theory that private international law exists to secure the extraterritorial recognition of vested rights has profoundly influenced English and American doctrine.² It has been generally affirmed by the English writers, and in particular by Dicey, whose entire system as expounded in his *General Introduction*³ is deduced from the principle embodied in Huber's third maxim, that a right duly acquired under the law of a particular country should be recognized in another state provided such recognition is not contrary to the public policy of that state.

The practical value of the doctrine of acquired rights is open to question, and it has been strongly argued that a theory which declares that a right should be enforced if validly created does not assist in determining whether that right is to be regarded as having been validly created.⁴ The vested-right theory provides a reason for the recognition of foreign law, but it does not by itself provide a criterion for the choice of law.

But in Huber's theory the principle of the recognition of duly created rights embodied in the third axiom is linked up with the principle of the territoriality of laws contained in the first and second axioms. Taken together, he thought that they provided a solution to the problems of the Conflict of Laws. He maintained that the foundation of his whole doctrine was the subjection of all persons to the law of a country so long as they continue to act there, so that an act valid or invalid from the beginning in accor-

¹ With this may be compared the passage in *De Jure Civitatis*, Lib. iii, cap. x, t. 102, quoted by Meijers, *supra*: "Si enim gens una leges alterius nullo modo agnoscere vimque illis debitam tribuere vellet, infiniti actus et contractus omni die in irritum caderent, neque commercia mari terraque consistere possent."

² See Beale, *Conflict of Laws*, Vol. III, Appendix, Ch. 3.

³ *Conflict of Laws*, 15th ed., Introduction, pp. 1-48.

⁴ See Arminjon, *supra*.

dance with the law of that country is valid or invalid elsewhere.¹ According to Huber's doctrine, therefore, whether a right has been validly constituted depends upon the law of the place where it was created, for the only law which can create a right is the law of the place where it originated. It is to be noted, however, that Huber did not apply the test inflexibly in all cases. We have already seen that in the case of contracts he introduces an exception to the *lex loci contractus* where the contract was made with reference to another law, and a similar concession to the law of matrimonial domicile is made in the case of marriage.

The tendency to regard the principle of territoriality as constituting the foundation of the Conflict of Laws is seen in Story's *Commentaries*, and it has influenced the works of the majority of English and American writers. In recent years, however, there has developed a reaction against the traditional view. In England, this reaction has found powerful expression in Dr. Cheshire's work, where the emphasis throughout is on the "proper law" rather than on the territorial law.² In the United States, the doctrine derived from Huber has been vigorously attacked by the writers of the "realist" school, who contend with great force that the rules of the Conflict of Laws should depend upon a consideration of the objects which they are intended to achieve, and not upon the dogma of the territoriality of laws.³ On the other hand, the prevailing American doctrine continues to be based on Huber's premisses, and the influence of the *De Conflictu Legum* on the Restatement of the Conflict of Laws is unmistakable.

So far we have been concerned with Huber's influence on the general theory of private international law. We have now to consider the actual rules and principles which he formulated on the basis of his three fundamental maxims, and to see to what extent they have been followed by the English courts.

Huber lays down as his basic general principle the proposition that the validity and effect of an act are determined by the law of the place where that act was done. This principle is applied to contracts, marriages, wills, and judgments.⁴

The other rules may be regarded, either as applications of, or as exceptions to, this main general principle, and they may be summarized under the following heads.

¹ § 3.

² *Private International Law* (1935).

³ See Lorenzen, "Territoriality, Public Policy and the Conflict of Laws", in *Yale Law Journal*, Vol. XXXIII, p. 736. Lorenzen and Heilman, *Pennsylvania Law Review*, 1935, Vol. LXXXIII, p. 555, and Yntema, *Columbia Law Review*, Vol. XXXVI, p. 183.

⁴ § 3.

1. *Public Policy*

An act, although valid according to the *lex loci actus*, will not give rise to rights enforceable in another state, where this would be contrary to the interest of that state.¹ From this it followed according to Huber's view that a state would not be prepared to recognize rights acquired by its citizens in another country in circumstances amounting to an evasion of the law of their own country. In this connexion he deals with the problem of marriages celebrated abroad with a view to evading the requirements with regard to parental consents, and he concludes that such marriages should not be enforced. In *Robinson v. Bland*² Huber's statement was referred to by Lord Mansfield, but without expressing any opinion of his own on the matter beyond saying that the question was undecided. In *Crompton v. Bearcroft*³ it was decided, contrary to Huber's view, that a marriage celebrated in Scotland was valid notwithstanding that the object of the parties was to evade the requirements of English law, although Lord Brougham in 1839 expressed his preference for Huber's principle, and regretted that marriages celebrated in Scotland in *fraudem legis Anglicanae* had been upheld.⁴ The rejection of Huber's view was of considerable importance, for it meant that the English courts were henceforth precluded from evolving a general doctrine of *fraude à la loi*, which constitutes an important feature of foreign systems of private international law.

On the same ground Huber maintained that a state was not required to enforce a right created under a foreign law where this would be contrary to the interest of its citizens or inconsistent with the rights acquired by them under their own law. Consequently, a title acquired under the local law will not be affected by a prior charge based on an agreement entered into in a foreign country, but which does not confer priority under the local law. Where a contract concluded under the law of a foreign country is inconsistent with a contract concluded under the local law, Huber considered that it was unreasonable to sacrifice the claims of the local law to those of the foreign law.⁵

2. *Status and Capacity*

In paragraph 12 Huber lays down the rule that "personal qualities impressed upon a person by the law in any place are

¹ § 3 and § 9.

² 2 Burr. 1077, 1 W. Bl. 234 and 256.

³ Cited in *Harford v. Morris*, 2 Hagg. Con. 429, 430, and Bull. N. P. 114.

⁴ *Birtwhistle v. Vardell* (1839), 7 Cl. & F. 895.

⁵ § 11.

carried with him and accompany his person everywhere". But although a person retains everywhere a status conferred upon him in a particular place, Huber rejects the view that his capacity to act outside that country is also determined by the law under which such status was acquired. "This", he says, "does not appear to me to be well founded, as it would produce too great a confusion of laws, and too great a burden upon neighbouring states from the laws of their neighbours."¹ According to Huber's interpretation of the principle, while a person retains his status everywhere, his capacity to act in another country will be that which the law of that other country attributes to such a status. Consequently, a person who has acquired the status of a minor is treated as a minor everywhere, but his capacity to act in a particular place will be that enjoyed by minors according to the law of that place, and not according to the law under which the status arose.

While the theory has not been followed in England in the precise form given to it by Huber, the view is generally accepted that capacity to enter into an ordinary contract is governed by the *lex loci contractus*.² Moreover, the distinction which Huber draws between status and capacity is of interest in view of the fact that a similar theory has been advanced by a well-known modern writer on this subject.³

3. *Contracts*

Huber lays down the general principle that the validity and effect of a contract are to be determined by the *lex loci contractus*, but, as we have already seen, he makes an exception where the parties in contracting had in mind the law of another place. This was followed by Lord Mansfield in *Robinson v. Bland*,⁴ and the doctrine of the proper law which occupies such an important position in English private international law is, therefore, directly traceable to the *De Conflictu Legum*.

4. *Marriages*

It follows from Huber's general principle that the validity and effect of a marriage are governed by the *lex loci celebrationis*, but subject to the qualification that a marriage *in fraudem legis* will not be recognized.⁵ Similarly, the effect of marriage on property

¹ § 14.

² See Cheshire, *Private International Law*, Chap. VII, where the cases and theories are fully considered.

³ Allen, "Status and Capacity", *L.Q.R.*, 1930, Vol. XLVI, p. 277.

⁴ See *supra*.

⁵ § 8 and § 9.

is generally governed by the law of the country of the marriage, but here again, Huber introduces a qualification similar to that which applies in the case of contracts. "The place of marriage", he says, "is not so much the place where the marriage contract was entered into, as the place where the parties intended to make their home."¹ The theory that the governing law in the case of marriage should be that of the matrimonial domicile is entirely in accordance with Huber's doctrine.²

5. *Procedure and Limitations of Actions*

Huber holds that the manner of enforcing a right created by another law, and the time within which an action must be brought, are governed by the *lex fori*. This he explains on the ground that "prescription and execution do not pertain to the substance of the contract, but to the time and manner of bringing suit".³

Huber's statement was frequently cited in early English decisions on this matter, and the rule that the limitation of actions and the nature of the remedy are to be classified as matters of procedure was largely based upon it.⁴ It was also considered in *Leroux v. Brown*⁵ in relation to the classification of the requirements of section 4 of the Statute of Frauds.

6. *Immovables*

Although the rule that the validity of an act is governed by the law of the place where it was done is applied by Huber to immovables as well as movables, he admits that it cannot operate so as to alter the incidents of immovable property, since these are regulated exclusively by the *lex situs*.⁶ On this matter the English rule is in complete agreement with Huber's statement.⁷ On the other hand, his contention that a contract or will relating to foreign land is validly executed if made in accordance with the law of the place where the contract or will was made was incompatible with the common-law tendency to regard immovable property as being subject exclusively to the *lex situs*.⁸

¹ § 10: *Locus matrimonii contracti non tam is est, ubi contractus nuptialis initus est, quam in quo contrahentes matrimonium exercere voluerunt.*

² In support of the law of the matrimonial domicile see Cheshire: *Private International Law*, p. 152 *et seq.*

³ § 7.

⁴ See *British Linen Co. v. Drummond* (1830), 10 B. & C. 903; *De la Vega v. Vianna* (1830), 1 B. & Ad. 284; *Don v. Lippmann* (1837), 5 Cl. & F. 1.

⁵ (1852), 12 C.B. 801.

⁶ § 15.

⁷ See *Bailie v. Miller* (1883), 8 App. Cas. 577.

⁸ This tendency is particularly evident in *Birtwhistle v. Vardell* (1840), 7 Cl. & F. 895.

DE CONFLICTU LEGUM

TEXT AND TRANSLATION¹

DE CONFLICTU LEGUM DIVERSARUM IN DIVERSIS IMPERIIS.

1. *Origo et usus hujus Quaesiti, forensis quidem, at juris Gentium magis quam civilis.*
2. *Regulae fundamentales hujus doctrinae.*
3. *Acta inter vivos et mortis causa valent ubique secundum jus loci, quo celebrantur.*
4. *Quod exemplo declaratur, testamenti.*
5. *Contractus.*
6. *Rei Judicatae.*
7. *Actionis instituendae.*
8. *Matrimonii.*
9. *Extendi hoc etiam ad effectus earum rerum, etiam quod ad immobilia.*
10. *Limitatio regulae de loco.*
11. *Alia limitatio ejusque ampliatio.*
12. *Regula de qualitatibus personarum certo loco impressis, ubique vim habentibus.*
13. *Scilicet, qualem ejusmodi personae jure cujusque loci habent: ut exemplis declaratur.*
14. *In jure immobilium spectari jus loci, quo sita sunt.*
15. *Declaratur exemplis Testamenti, Contractuum et Successionis ab intestato.*

1. Saepe fit, ut negotia in uno loco contracta usum effectumque in diversi locis imperii habeant, aut alibi dijudicanda sint. Notum est porro, leges et statuta singulorum

ON THE CONFLICT OF DIFFERENT LAWS IN DIFFERENT STATES.

1. *Of the origin and application of this subject, forensic certainly, but pertaining more to the law of nations than to the civil law.*
2. *The fundamental rules of this subject.*
3. *Acts inter vivos and mortis causa are valid everywhere according to the laws of the place where they are done.*
4. *Its application explained in the case of: Wills.*
5. *Contracts.*
6. *Judicial decisions.*
7. *Bringing of actions.*
8. *Marriage.*
9. *Extension of this rule to the effect of the above matters, even as regards immovables.*
10. *Limitation of the rule of the place.*
11. *Another limitation and its extension.*
12. *The rule that personal qualities impressed in a particular place have force everywhere.*
13. *That is to say, such force as they have by the law of each place in the case of persons of that category; as is shown by examples.*
14. *As regards immovables the law of the place where they are situated to be observed.*
15. *This is explained in the case of wills, contracts, and intestate succession.*

1. It often happens that transactions entered into in one place have force and effect in the territories of a different state, or have to be adjudicated upon in another place. Moreover, it is well known

¹ The text follows the second edition of the *Praelectiones Juris Romani et Hodierni* (1707). No translation of the chapter *De Conflictu Legum* appears to have been published in England, but the writer has derived much assistance from the American translations, and particularly from that of Prof. Lorenzen in *Illinois Law Review*, 1919, Vol. XIII, pp. 401 *et seq.*

populorum multis partibus discrepare, posteaquam dissipatis imperii Romani provinciis, divisus est orbis Christianus in populos ferme innumeros, sibi mutuo non subiectos, nec ejusdem ordinis imperandi parendique consortes. In jure Romano non est mirum nihil hac de re exstare, cum populi Rom. per omnes orbis partes diffusum et aequabili jure gubernatum Imperium, conflictui diversarum Legum non aequè potuerit esse subjectum. Regulae tamen fundamentales, secundum quas hujus rei judicium regi debet, ex ipso jure Rom. videntur esse petendae; quamquam ipsa quaestio magis ad jus Gentium quam ad jus Civile pertineat, quatenus quid diversi populi inter se servare debeant, ad juris Gentium rationes pertinere manifestum est. Nos ad detegendam hujus intricatissimae quaestionis subtilitatem, tria collocabimus axiomata, quae concessa, sicut omnino concedenda videntur, viam nobis ad reliqua planam redditura videntur.

2. Sunt autem haec: I. *Leges cujusque imperii vim habent intra terminos ejusdem Reip. omnesque ei subjectos obligant, nec ultra, per l. ult. ff. de Jurisdict.* II. *Pro subjectis imperio habendi sunt omnes, qui intra terminos ejusdem reperiuntur, sive in perpetuum, sive ad tempus ibi commorentur, per l. 7, s. 10. in fin. de interd. et releg.* III. *Rectores imperiorum id comiter agunt, ut jura cujusque populi intra terminos ejus exercita, teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis ejusque civium praejudicetur. Ex quo liquet, hanc rem non ex simplici jure Civili, sed ex commodis et tacito populorum consensu esse petendam: quia sicut*

that the laws of every nation differ in many respects, for since the breaking up of the provinces of the Roman Empire, Christendom has been divided into almost innumerable nations, not subject to one another and not sharing the same system of government. It is not surprising that there is nothing on the subject in Roman law, for since the sovereignty of Rome extended to all parts of the world and was regulated by a uniform law it could hardly give rise to a conflict of different laws. Nevertheless, the fundamental rules according to which this subject should be determined must be sought in the Roman law; although the subject itself pertains more to the law of nations than to the civil law, since that which different nations should observe among themselves clearly pertains to the law of nations. For the purpose of unfolding the difficulty of this particularly intricate subject we shall formulate three maxims, which being accepted, as undoubtedly it appears they should be, seem to clear the way for us for the solution of the remaining questions.

2. They are these:

(1) *The laws of every sovereign authority have force within the boundaries of its state, and bind all subject to it, but not beyond.* (D. 2, 1, 20.)

(2) *Those are held to be subject to a sovereign authority who are found within its boundaries, whether they be there permanently or temporarily.* (D. 48, 22, 7, § 10, i.f.)

(3) *Those who exercise sovereign authority so act from comity that the laws of each nation having been applied within its own boundaries should retain their effect everywhere so far as they do not prejudice the power or rights of another state or its subjects.*

From this it appears that this subject is to be derived not simply from the civil law, but from the convenience and tacit

leges alterius populi apud alium directe valere non possunt, ita commerciis et usu gentium promiscuo nihil foret magis incommodum, quam si res jure certi loci validae, mox alibi diversitate Juris infirmarentur, quae est ratio tertii axiomatis: quod, uti nec prius, nullum videtur habere dubium. De secundo videntur aliqui secus arbitrari, quando peregrinos legibus loci, in quibus agunt, teneri negant. Quod in quibusdam casibus esse verum fatemur et videbimus *infra*: sed hanc positionem, *pro subjectis imperio habendos omnes, qui infra fines ejusdem agunt*, certissimam esse, cum natura Reipubl. et mos subigendi imperio cunctos in civitate repertos, tum id, quod de arresto personali apud omnes fere gentes receptum est, arguit. Grotius 2. c. 11. n. 5. Qui in loco aliquo contrahit tanquam subditus temporarius legibus loci subjicitur. Nec enim ulla ratione freti sunt, qui peregrinos, sine alia causa, quam quod ibi reperiuntur, *Arresto* medio, illic juri sistere se cogunt, quam quod imperium in omnes, qui intra fines suos reperiuntur, sibi competere intelligunt.

3. Inde fluit haec Positio: *Cuncta negotia et acta tam in judicio quam extra judicium, seu mortis causa sive inter vivos, secundum jus certi loci rite celebrata valent, etiam ubi diversa juris observatio viget, ac ubi sic inita, quemadmodum facta sunt, non valent*. Et contra, negotia et acta certo loco contra leges ejus loci celebrata, cum sint ab initio invalida, nusquam valere possunt; idque non modo respectu hominum, qui in loco contractus habent domicilium, sed et illorum, *qui ad tempus ibidem*

consent of nations, for although the laws of one country cannot have any direct force in another, yet nothing could be more inconvenient to the commerce and general intercourse of nations than that that which is valid by the law of one place should be rendered invalid elsewhere owing to a difference in the law. And this is the reason for the third maxim concerning which no one hitherto seems to have entertained any doubt. As regards the second maxim, some persons seem to be of a different opinion and deny that foreigners are subject to the laws of the place in which they act. I admit this to be true in certain cases, as we shall see later. But the proposition that all persons who act within the limits of a state are to be deemed subject thereto is absolutely certain, for it is in accordance both with the nature of the state, and the practice of subjecting all persons found therein to its authority, and with that which is accepted by almost all nations in regard to personal arrest. Grotius, 2, c. 11, n. 5, maintains that he who contracts in any particular place is subjected as a temporary subject to the laws of that place. Nor is there any basis for the rule that foreigners are compelled to submit to mesne arrest for no other reason than that they are found in a place, except that the sovereign authority is deemed to extend to all persons who are found within its boundaries.

3. The following proposition follows from the above: all transactions and acts both in Court and out of Court, whether *mortis causa* or *inter vivos*, properly executed according to the law of a particular place are valid even where a different law prevails, and where if done in like manner, they would not be valid. On the other hand, transactions and acts executed in any place contrary to the law of that place, as they are in their origin invalid, cannot be valid anywhere. And this applies not only to persons who have their domicil in the place of the contract

commorantur. Sub hac tamen exceptione; si rectores alterius populi exinde notabili incommodo afficerentur, ut hi talibus actis atque negotiis usum effectumque dare non teneantur, secundum tertii axiomatis limitationem. Digna res est, quae exemplis declaretur.

4. In *Hollandia* testamentum fieri potest coram notario et duobus testibus, in *Frisia* non valet, nisi septem testibus confirmatum. Batavus fecit testamentum more loci in *Hollandia*, ex quo bona, quae sita sunt in *Frisia*, illic petuntur. Quaeritur, an iudices *Frisii* secundum illud testamentum vindicias dare debeant. Leges *Hollandiae* non possunt obligare *Frisios*, ideoque per axioma *primum* testamentum illud in *Frisia* non valeret, sed per axioma *tertium* valor ejus sustinetur et secundum illud jus dicitur. Sed *Frisius* proficiscitur in *Hollandiam*, ibique facit testamentum more loci contra jus *Frisicum*, redit in *Frisiam* ibique diem obit, valetne testamentum? valebit, per axioma *secundum*, quia dum fuit in *Hollandia*, licet ad tempus, jure loci tenebatur, actusque ab initio validus ubique valere debet, per axioma *tertium*, idque sine discrimine mobilium et immobilium bonorum, ut juris est ac observatur. *Frisius* e contra facit in patria testamentum coram notario cum duobus testibus, profertur in *Hollandia*, ibique bona sita petuntur, non fiet adjudicatio, quia testamentum inde ab initio fuit nulum, utpote factum contra jus loci. Quin idem juris erit, si Batavus heic in *Frisia* tale testamentum condat, etsi in *Hollandia* factum valeret; verum enim est, quod heic ita factum

but also to those who are there for the time being. But there is this exception: that if the rulers of another people would suffer a serious inconvenience thereby, they would not be bound to give effect to such acts and transactions in accordance with the limitation of the third maxim. The matter is sufficiently important to be explained by examples.

4. In *Holland* a testament may be made before a notary and two witnesses. In *Friesland* it is not valid unless confirmed by seven witnesses. A *Batavian* made a will in *Holland* according to the local law under which property situated in *Friesland* is demanded there. The question is whether the judges of *Friesland* ought to allow the claim under that will. The laws of *Holland* cannot bind the *Frisians*, and, therefore, by the first maxim, the will would not be valid in *Friesland*; but by the third maxim its validity would be upheld, and judgment is given accordingly. But a *Frisian* goes to *Holland* where he makes a will according to the local law, but contrary to *Frisian* law, and returns to *Friesland*, and dies there. Is the will valid? It will be valid according to the second maxim, because while he was in *Holland*, although only temporarily, he was bound by the law of the place, and an act valid from the beginning, should be valid everywhere in accordance with the third maxim, and this applies without any distinction between movable and immovable property, and this is the law as it is applied. On the other hand, a *Frisian* makes his will in his own country before a notary and two witnesses. It is brought to *Holland* and a claim is made for property situated there. It will not be granted because the will was invalid from the beginning on the ground that it was made contrary to the local law. The same will apply if a *Batavian* should make such a will in *Friesland*, although it would be valid if made in *Holland*; for a will made here in this manner will be invalid

ab initio fuerit nullum, per ea, quae modo dicta fuerunt.

5. Quod de testamentis habuimus, locum etiam habet in *actibus inter vivos*; proinde contractus celebrati secundum jus loci, in quo contrahuntur, ubique tam in jure quam extra judicium, etiam ubi hoc modo celebrati non valerent, sustinentur; idque non tantum de forma, sed etiam de materia contractus affirmandum est. *Ex. gr.* In certo loco merces quaedam prohibita sunt; si vendantur ibi, contractus est nullus; verum si merx eadem alibi sit vendita, ubi non erat interdicta, et ex eo contractu agatur in locis, ubi interdictum viget, emptor condemnabitur; quia contractus inde ab initio validus fuit. Verum si merces venditae, in altero loco, ubi prohibita sunt, essent tradendae, jam non fieret condemnatio; quia repugnaret hoc juri et commodo Reip. quae merces prohibuit, secundum limitationem axiomatis tertii. Ex adverso, si clam fuerint venditae merces, in loco, ubi prohibita sunt, emptio venditio non valet ab initio nec parit actionem, quocunque loco instituatur, utique ad traditionem urgendam: nam si traditione facta, pretium solvere nollet emptor, non tam e contractu quam re obligaretur, quatenus cum alterius damno locupletior fieri vellet.

6. Similem usum habet haec observatio in *rebus judicatis*. Sententia in aliquo loco pronuntiata, vel delicti venia ab eo, qui jurisdictionem illam habet, data, ubique habet effectum, nec fas est alterius Reipub. magistratibus, Reum alibi absolutum veniave donatum, licet absque justa causa, persequi aut iterum permittere accusandum;

from the beginning for the reasons just stated.

5. What we have stated about wills applies also to acts done *inter vivos*. Contracts made in accordance with the law of the place where they are entered into are, therefore, upheld everywhere both in Court and out of Court, even where contracts entered into in such manner would not be valid. And this is to be affirmed not only with respect to the form, but also as regards the substance of the contract. For example: In a particular place certain goods are prohibited [to be sold]. If sold there, the contract is void, but if the same goods be sold in another place where they were not prohibited, and an action is brought on the contract in a place where the prohibition exists the buyer will be held liable, because the contract was valid from the beginning. But if the goods sold were to be delivered in another place, where they are prohibited, the buyer will not be liable, because it would be repugnant to the law and interest of the state prohibiting such goods, in accordance with the second limitation upon the third maxim. On the other hand, if the goods should be sold secretly in a place where they are prohibited, the sale is not valid from the beginning, nor does an action lie, no matter where it may be brought, at any rate to compel delivery, for if after delivery the purchaser should refuse to pay the price, he would be bound not so much by virtue of the contract as by the delivery, in that he would be seeking to enrich himself at the expense of another.

6. This statement applies equally to judicial decisions. A sentence pronounced in any place, or a pardon of a crime granted by one having that jurisdiction has effect everywhere, nor is it proper for the magistrates of another state to prosecute or to permit to be charged again a party who has been acquitted or pardoned in another place, even without adequate reason. But again, subject to this exception: unless some evident danger or in-

Rursus sub hac exceptione; nisi ad aliam Rempubl. evidens inde periculum aut incommodum resultare queat; ut hoc exemplo constare potest nostrae memoriae. Titius in Frisiae finibus homine percusso in capite, qui sequenti nocte, sanguine multo e naribus emisso, at bene potus atque cenatus, erat exstinctus; Titius, inquam, evasit in Transisulaniam. Ibi captus, ut videtur volens, mox judicatus et absolutus est, tanquam homine non ex vulnere exstincto. Haec sententia mittitur in Frisiam et petitur impunitas rei absoluti. Quanquam ratio absolutionis non erat a fide veri aliena, tamen Curia Frisiae vim sententiae veniamque reo polliceri, Transisulani licet postulantibus, gravata est. Quia tali in viciniam effugio et processu adfectato, jurisdictioni Frisorum eludendae via nimis parata futura videbatur, quae est tertii axiomatis exceptionis ratio. Idem obtinet in sententiis rerum Civilium, quo pertinet sequens exemplum memoriae quoque nostrae. Civis *Harlinganus* contractum iniverat cum *Groningano*, seque submiserat iudicibus Groninganis. Vi submissionis hujus Groningam citatus, et cum non sisteret se, condemnatus fuerat, quasi per contumaciam. Petita executione dubitatum est, an concedenda foret, in curia Frisica. Dubitandi ratio, quod vi submissionis, si reus in territorio iudicis, cui se submitit, non reperiatur, nemo contumaciae peragi possit, ut *alibi* videbimus; neque *sine detrimento jurisdictionis nostrae et praejudicio civium nostratum talibus sententiis effectus dari queat*. Concessa tamen est eo tempore; quibusdam Dominis ita censentibus; quod Frisiis non

convenience should result to the other state, as may be seen from the following example within our recollection. Titius struck a man on the head in Frisian territory. This man having lost much blood through the nose, and having drunk and eaten well, died the following night. Titius escaped into Overysse. Having been apprehended there, voluntarily, as it seems, he is immediately tried and acquitted on the ground that the man had not died from the wound. This judgment is sent to Friesland and freedom from punishment is claimed for the acquitted. Although the ground for the acquittal was not inconsistent with the truth, nevertheless the Court of Frisia had great difficulty in deciding whether to recognize the judgment and excuse the accused, although demanded by the people of Overysse; since such an escape into a neighbouring country and feigned proceedings appeared to open the way too much for the evasion of the Frisian jurisdiction which is the basis of the exception to the third maxim. The same applies to judgments in civil matters, to which the following example also within our recollection refers. A citizen of Harlem entered into a contract with a citizen of Groningen by which he had submitted to the judges of Groningen. Being cited to appear at Groningen by virtue of this submission, as he did not appear, judgment was given against him on the ground of contumacy. When execution was demanded in the Frisian Court it was doubted whether it ought to be granted. The reason for the doubt was that if a defendant cannot be found in the territory of the judge to whom he had submitted, he cannot by reason of the submission be proceeded against for contumacy, as we shall see elsewhere; nor can effect be given to such judgments without detriment to our own jurisdiction and prejudice to our own citizens. It was granted, however, at that time, some of the judges being of the opinion that it was not open to the Frisians

liceret arbitrari, quo jure sententia Groningae lata esset, modo secundum jus loci valeret. Alii hac ratione; quod Magistratus Harlinganus in urbe sua requisitus citationem permiserat, quod facere potius non debuisset. Alioqui Amstelodamenses negavisse executionem sententiae latae in absentem, per Edictum vi submissionis citatum ad Curiam Frisicam, et nemine contradicente damnatum, memini factum et recte meo judicio; propter limitationem axiomatis *tertii* commemoratam.

7. Praeterea dubitatum est, si ex contractu alibi celebrato, apud nos actio instituatur, atque in ista actione danda vel neganda aliud juris apud nos, aliud esset, ubi contractus erat initus, utrius loci jus servandum foret. Exemplum: Frisius in Hollandia debitor factus ex causa mercium particulatim venditarum, convenitur in Frisia post biennium. Opponit Praescriptionem apud nos in ejusmodi debitis receptam. Creditor replicat, in Hollandia, ubi contractus initus erat, ejusmodi praescriptionem non esse receptam; Proinde sibi non obstare in hac causa. Sed aliter judicatum est, semel in causa *Justi Blenkenfeldt* contra G. Y., iterum inter *Johannem Jonoliin*, Sartorem Principis Aurau-sionensis contra N. B., *utraque ante magnas ferias 1680*. Eadem ratione, si quis debitorem in Frisia conveniat ex instrumento coram Scabinis in Hollandia celebrato, quod ibi, non jure communi, habet paratam executionem, id heic eam vim non habebit, sed opus erit causae cognitione et sententia. Ratio haec est, quod praescriptio et executio non pertinent ad valorem contractus, sed ad tempus et modum actionis instituendae, quae per se quasi con-

to inquire into the grounds on which the judgment was given, but merely whether it was valid according to the law of the place. Others adopted the view that the magistrate at Harlem on being requested in his own city had allowed the process, which he ought rather not to have done. Moreover, I remember that the magistrates in Amsterdam refused the execution of a judgment given against an absent defendant, who, after having been cited before a Frisian Court by an order based on submission, was condemned by default, and in my opinion this was correct on account of the above limitation upon the third maxim.

7. Again, the question is asked which law should apply if an action is brought here on a contract made elsewhere, and our law differs from the law of the place where the contract was entered into with respect to granting or denying an action. For example, a Frisian who becomes indebted in Holland on account of goods sold there by retail, is sued in Friesland after two years. He pleads the prescription applicable with us to this class of debt. The creditor replies that in Holland, where the contract was entered into, such prescription is not accepted, and that, therefore, it does avail against him in this action. But it was decided otherwise, once in the case of *Justus Blenkenfeldt v. G. Y.*, and again in *John Jonoliin*, tailor to the Prince of Orange, v. *N. B.*, both before the great fair of 1680. For the same reason, if some one should sue a debtor in Friesland on an instrument executed before magistrates in Holland which is entitled there to summary execution, but not by the general law, it will not have that effect here, but will require trial and judgment. The reason is that prescription and execution do not pertain to the validity of the contract, but to the time and mode of bringing the action, which in itself constitutes as it were a contract, and a separate transaction. It is, therefore, accepted for the very good

tractum separatumque negotium constituit, adeoque receptum est optima ratione, ut in ordinandis judiciis, loci consuetudo, ubi agitur, etsi de negotio alibi celebrato, spectetur, ut docet Sandius *lib. 1, tit. 12, def. 5*, ubi tradit, etiam in executione sententiae alibi latae, servari jus, in quo fit executio, non ubi res iudicata est.

8. *Matrimonium* pertinet etiam ad has regulas. Si licitum est eo loco, ubi contractum et celebratum est, ubique validum erit effectumque habebit, sub eadem exceptione, praejudicii aliis non creandi; cui licet addere, si exempli nimis sit abominandi; ut si incestum juris gentium in secundo gradu contingeret alicubi esse permissum; quod vix est ut usu venire possit. In Frisia matrimonium est, quando mas et foemina in nuptias consenserunt et se mutuo pro conjugibus habent, etsi in Ecclesia numquam sint conjuncti: Id in Hollandia pro matrimonio non habetur. Frisii tamen Conjuges sine dubio apud Hollandos jure Conjugum, in lucris dotium, donationibus propter nuptias, successionibus liberorum aliisque fruentur. Similiter, Brabantus uxore ducta dispensatione Pontificis, in gradu prohibito, si huc migret, tolerabitur; at tamen si Frisius cum fratris filia se conferat in Brabantiam ibique nuptias celebret, huc reversus non videtur tolerandus; quia sic jus nostrum pessimis exemplis eluderetur, eoque pertinet haec observatio; Saepe fit, ut adolescentes sub Curatoribus agentes furtivos amores nuptiis conglutinare cupientes, abeant in Frisiam Orientalem, aliave loca, in quibus Curatorum consensus ad matrimonium non requiritur, juxta leges Romanas,

reason that in matters of procedure the practice of the place where the action is brought is observed, even as regards transactions concluded elsewhere. This is taught by John à Sande, *lib. 1, tit. 12, def. 5*, where he declares that even as regards the execution of a judgment given elsewhere, the law of the place of the execution is to be followed, not that of the place where the judgment was given.

8. Marriage also falls under the same rules. If it is lawful in the place where it is contracted and celebrated, it will be valid and effectual everywhere, subject to the exception, that it does not prejudice others, to which may be added, unless it is too revolting; for example, if a marriage in the second degree incestuous according to the law of nations happened to be permitted anywhere, which is hardly likely to be the case. In Friesland a marriage is constituted when a man and a woman agree to marry, and take one another as husband and wife, although they have never been married in a Church. In Holland this is not treated as a marriage. Nevertheless, Frisian spouses will enjoy in Holland without question the rights of husband and wife in the matter of marriage settlements, the children's rights of succession, &c. Similarly, if a citizen of Brabant, who under a Papal dispensation has married within the prohibited degree, should migrate here, the marriage will be recognized. On the other hand, if a Frisian should go with his niece to Brabant and marry there, it seems that his marriage should not be recognized here on his return, since our law would thereby be evaded by the worst precedents. The following observation also bears on this matter. It often happens that young persons under guardians desiring to seal their secret loves in marriage go to Eastern Friesland, or some other place where the consent of the guardians is not required for the marriage in accordance with Roman Law, which is no longer in force with us on this matter. They

quae apud nos hac parte cessant. Celebrant ibi matrimonium et mox redeunt in Patriam. Ego ita existimo, hanc rem manifesto pertinere ad eversionem juris nostri; ac ideo non esse Magistratus heic obligatos, e jure Gentium, ejusmodi nuptias agnoscere et ratas habere: Multoque magis statuendum est, eos contra Jus Gentium facere videri, qui civibus alieni imperii sua facilitate, jus Patriis Legibus contrarium, scientes volentes, impertiuntur.

9. Porro, non tantum ipsi contractus ipsaeque nuptiae certis locis rite celebratae ubique pro justis et validis habentur, sed etiam jura et effecta contractuum nuptiarumque in iis locis recepta, ubique vim suam obtinebunt. In Hollandia conjuges habent omnium bonorum communionem, quatenus aliter pactis dotalibus non convenit; hoc etiam locum habebit in bonis sitis in Frisia, licet ibi tantum sit communio quaestus et damni, non ipsorum bonorum. Ergo et Frisii conjuges manent singuli rerum suarum, etiam in Hollandia sitarum, domini: cum primum vero conjuges migrant ex una provincia in aliam, bona, quae deinceps alteri adveniunt, cessant esse communia manentque distinctis proprietatibus; sicut res antea communes factae manent in eo statu juris, quem induerunt, ut docet Sandius *lib. 2, decis. tit. 5, def. 10*, ubi in fine testatur, inter consuetudinarios Doctores esse controversum, an immobilia bona etiam alibi sita in tali specie communicentur, quod nos affirmandum putamus. Ratio dubitandi, quod Leges alterius Reip. non possint alieni territorii partes integrantes afficere; sed responsio est duplex: prima, non fieri hoc vi legis alienae immediata, sed accedente consensu Potestatis summae in altera Civitate, quae

celebrate their marriage there, and immediately return home. I consider that this obviously involves the subversion of our own law, and that, therefore, our magistrates are not bound by the law of nations to recognize and give effect to such marriages here. And still more should it be held that those persons appear to act contrary to the law of nations who by means of their facility, knowingly and intentionally share with the citizens of another state a right contrary to the laws of their own country.

9. Furthermore, not only are the agreements and the marriages themselves, properly entered into in a certain place, regarded as binding and valid everywhere, but the rights and effects attached to them in that place also retain their force everywhere. In Holland the spouses have community of all their property unless it is otherwise agreed in their marriage contract, and this will also apply to property situated in Friesland, although here there is only community of profit and loss, and not of the property itself. Therefore, Frisian spouses remain the separate owners of their property even if situated in Holland. But when the spouses remove from one province to another, property which afterwards comes to either of them, ceases to be in community and remains in separate ownership, just as property previously owned in community remains in that legal status which it had acquired. This is the view taught by John à Sande, *lib. 2, decis. tit. 5, def. 10*, where it is stated at the end that there is a controversy among those who are learned in the customary law whether immovables situated elsewhere are also subject to the same rule, which we consider to be correct. The reason for the doubt is that the laws of another state cannot affect integral parts of another territory; but to this there are two answers. The first is that it is not by virtue of the immediate force of a foreign law, but in consequence of the consent of the supreme power in the other state that

legibus alienis in loco suo exercitis praebeet effectum; sine suo suorumque praejudicio, mutuae populorum utilitatis respectu, quod est fundamentum omnis hujus doctrinae. Altera responsio est, non tantum hanc esse vim Legis, sed etiam consensum partium bona sua invicem communicantium, cujus vi mutatio dominii non minus per matrimonium quam per alios contractus fieri potest.

10. Verum tamen non ita praecise respiciendus est locus, in quo Contractus est initus, ut si partes alium in contrahendo locum respexerint, ille non potius sit considerandus. *Contraxisse unusquisque in eo loco intelligitur, in quo ut solveret, se obligavit, l. 21, de O, et A.* Proinde et locus matrimonii contracti non tam is est, ubi contractus nuptialis initus est, quam in quo contrahentes matrimonium exercere voluerunt; ut omni die fit, homines in Frisia indigenas aut incolas ducere uxores in Hollandia, quas inde statim in Frisiam deducunt; idque si in ipso contractu ineundo propositum habeant, non oritur communio bonorum, etsi pacta dotalia sileant, secundum jus Hollandiae, sed jus Frisiae in hoc casu est jus loci Contractus.

11. Datur et alia limitationis saepe dictae applicatio, in hoc articulo; Effecta contractuum certo loco initorum, pro jure loci illius alibi quoque observantur, *si nullum inde civibus alienis creatur praejudicium, in jure sibi quaesito*, ad quod Potestas alterius loci non tenetur neque potest extendere jus diversi territorii. Exemplum: Hypotheca conventionalis antiquior in re mobili, dat *πρωτοπραξία* jus *Praelationis*, etiam contra tertium possessorem, Jure Caesaris et in Frisia,

effect is given to foreign laws where they have been applied within its territory, in consideration of the mutual convenience of nations, provided no prejudice results to itself or its citizens, which is the basis of the whole of this subject. The second answer is, that this is not so much the operation of the law as the agreement of the parties to share their property with one another, by which means a transfer of property may be effected by marriage no less than by other contracts.

10. But the place where the contract was entered into should not be too strictly regarded, for if the parties in contracting had another place in mind, the former should not prevail. "*Everyone is deemed to have contracted in that place in which he is bound to perform.*" D. 44, 7, 21. Hence the place of marriage is not so much the place where the marriage contract is entered into, as the place where the contracting parties intended to make their home. It happens every day that men in Friesland, either natives or residents, marry in Holland, and then immediately bring their wives to Friesland, and if at the time of the marriage they had such an intention, there will be no community of property according to the law of Holland, even in the absence of a marriage settlement, for in this case the law of Friesland is [the law] of the place of the contract.

11. There is also another application of this limitation which is often stated in this connexion: The effects of contracts entered into in a certain place are recognized elsewhere according to the law of the former place, provided no prejudice is caused to the citizens of the other state with respect to rights acquired by them, and the sovereign of the other place is not bound to extend, nor can it extend, the law of another territory that far. For example: a prior hypothecation by agreement of movable property gives *πρωτοπραξία*, i.e. a right of priority, even against a third possessor according to the imperial

non apud Batavos. Proinde si quis ex ejusmodi hypotheca in Hollandia agat adversus tertium, non audietur; quia jus illi tertio in ista re mobili quaesitum per jus alieni territorii non potest auferri. Ampliamus hanc regulam tali extensione; Si jus loci in alio Imperio pugnet cum jure nostrae civitatis, in qua contractus etiam initus est, confligens cum eo contractu, qui alibi celebratus fuit: magis est, ut jus nostrum quam jus alienum servemus. Exemplum: In Hollandia contractum est matrimonium cum pacto, *ne uxor teneatur ex aere alieno a Viro solo contracto*; Hoc etsi privatum contractum valere dicitur in Hollandia, cum Praejudicio creditorum, quibus Vir postea obligatus est: in Frisia id genus pacta non valent, nisi publicata, nec obstant ignorantiam allegantibus justam, idque recte secundum jus Caesarum et aequitatem. Vir in Frisia contrahit aes alienum, uxor hic pro parte dimidia convenitur. Opponit pactum dotale suum; Creditores replicant, Jure Frisiae, non esse locum huic pacto, quia non est publicatum, et hoc praevallet apud nos in contractibus heic celebratis, ut nuperrime consultus respondi. Sed qui in Batavia contraxerunt, etsi agentes in Frisia, tamen repellentur; quia tum simplex unumque; jus loci contractus, non duplex, venit in considerationem.

12. Ex Regulis initio collocatis etiam hoc axioma colligitur. *Qualitates personales certo loco alicui jure impressas, ubique circumferri et personam comitari, cum hoc effectu, ut ubivis locorum eo jure, quo tales personae alibi gaudent vel subjecti sunt, fruuntur et subjiciantur.* Hinc qui apud nos in Tutela, Curave sunt,

law and in Friesland, but not with the Batavians. Consequently, if some one should proceed against a third party under such hypothecation, he would not succeed, since the rights of a third party in the movable cannot be taken away by the law of another territory. We enlarge this rule to the following extent: If the law of the place [of contracting] in another state should conflict with the law of our state, where a contract was also entered into, which is inconsistent with the contract which was concluded elsewhere, it is more reasonable that we should follow our own law rather than the foreign law. For example: In Holland a marriage is contracted with an agreement that the wife shall not be liable for debts contracted by the husband alone. Although a private contract, it is said to be valid in Holland to the prejudice of creditors to whom the husband is subsequently indebted. In Friesland these contracts are not valid unless published, nor do they affect those who have reasonable grounds for being ignorant of them. A husband contracts a debt in Friesland, and the wife is sued here for one half of the amount. She pleads her marriage contract. The creditors reply that by Frisian law this is not recognized here because it was not published, and this contention prevails with us with respect to contracts made here, as I recently advised when I was consulted. But those who have contracted in Brabant, notwithstanding the action is brought in Friesland, will be non-suited because here one law only, and not two, namely the law of the place of contracting, comes into consideration.

12. From the rules laid down at the beginning the following maxim also is derived. *Personal qualities impressed upon a person by the law in any place are carried with him and accompany his person everywhere, with this effect, that everywhere persons enjoy and are subject to that law which persons of the same class enjoy and are subject to in such other place.* Therefore,

ut adolescentes, filii fam., prodigi, mulieres nuptae, ubique pro personis Curae subjectis habentur, et jure, quod Cura singulis in locis tribuit, utuntur fruuntur. Hinc qui in Frisia veniam aetatis impetravit, in Hollandia contrahens ibi non restituitur in integrum. Qui prodigus heic est declaratus, alibi contrahens valide non obligatur neque convenitur. Rursus in quibusdam Provinciis qui viginti annos excescere pro *majoribus* habentur, et possunt alienare bona immobilia, aliaque jura minorum exercere in illis etiam locis, ubi ante viginti quinque annos nemo censetur esse major; Quia Legibus rebusque judicatis aliarum Civitatum in suos subjectos quaelibet aliae potestas comiter effectum tribuunt; quatenus suo suorumque juri quaesito non praecjudicatur.

13. Sunt, qui hunc effectum qualitatis personalis ita interpretantur, ut qui certo loco, major aut minor, pubes aut impubes, filius aut paterfam. sub curatore vel extra Curam est, ubique tali jure fruatur eique subjiçatur, quo fruitur et cui subjiçitur in eo loco, ubi primum talis factus est aut talis habetur: proinde, quod in patria potest aut non potest facere, id eum nusquam non posse vel prohiberi facere. Quae res mihi non videtur habere rationem, quia nimia inde σύγχυσις jurium et onus pro vicinis ex aliorum legibus oriretur. Exemplis momentum rei patebit. Filiusfam. in *Frisia* non potest facere testamentum. Proficiscitur in *Hollandiam* ibique facit testamentum; quaeritur, an valeat. Puto valere utique in *Hollandia*, per *Regulam primam et secundam*, quod

those who with us are under tutelage or guardianship, such as minors, unemancipated sons, prodigals, and married women, are regarded everywhere as persons subject to guardianship, and possess and enjoy the rights which guardianship confers in any particular place. Consequently, a person who has acquired the rights of majority in Friesland, if he contracts in Holland, will not be granted restitution there. He who is declared a prodigal here cannot conclude a valid contract, or be sued in another place. Again, in some provinces those who are over twenty-one years of age are deemed to be of full age, and may alienate their immovable property and exercise other rights of majority (?), even in those places where a person only becomes of age at twenty-five, because all governments give effect by comity to the laws and judgments of other states as regards their subjects, provided no prejudice is caused to such state or to the rights of its citizens.

13. There are those who interpret the effect of a personal quality as follows: that he who in a certain place is of full age or a minor, over or under the age of puberty, an unemancipated son or *paterfamilias*, under or out of guardianship, everywhere enjoys, and is subject to that law which he enjoys, and to which he is subject, in that place where he first acquired that status or is deemed to have acquired it, so that whatever he can do, or cannot do, in his own country, he is allowed to do, or is prohibited from doing, everywhere. This does not appear to me to be well founded, as it would produce too great a confusion of laws, and too great a burden upon neighbouring states from the laws of other states. The importance of this will appear from examples. An unemancipated son in Friesland cannot make a will. He goes into Holland and there makes a will. The question is asked whether it is valid. I think it is valid, at any rate in Holland, according to the first and second maxims, because

leges afficiant omnes eos, qui sunt in aliquo territorio: nec civile sit, ut Batavi de negotio apud se gesto, suis legibus neglectis, secundum alienas judicent. Attamen verum est, id heic in *Frisia* non habiturum esse effectum, per *regulam tertiam*, quod eo modo nihil facilius foret quam Leges nostras a Civibus eludi, sicut eluderentur omni die. Sed alibi tale testamentum valebit, etiam ubi filiisfam. non licet facere testamentum, quia cessat ibi illa ratio eludendi juris patrii per suos cives; quod in tali specie non foret commissum.

Hoc exemplum spectabat actum ob personalem qualitatem domi prohibitum. Dabimus aliud de actu domi licito, sed illic, ubi celebratus est, prohibito, in suprema Curia quandoque judicatum. *Rudolphus Monsema* natus annos XVII *Groningae* diebus quatuordecim, postquam illuc migraverat, ut pharmaceuticam disceret, Testamentum condiderat, quod ei in *Frisia* liberum erat facere, sed *Groningae*, ait *D. Nauta* Relator hujus judicati, non licet idem puberibus *infra XX annos*, nec tempore morbi fatalis, neque de bonis hereditariis ultra partem dimidiam. Decesserat ex eo morbo adolescens, herede Patruo, materis legato dimissis, quae testamentum dicebant nullum, utpote factum contra jus loci. Heres urgere, personalem qualitatem ubique circumferri et jus ei in Patria competens alibi quoque valere: sed judicatum est contra testamentum, convenienter ei, quod diximus, praesertim cum heic eludendi juris patrii affectatio nulla fuisset, etsi minime consentientibus suffragiis. *Nauta* quoque dissentiente. *Decis. M. S. 134. Anno. 1643. d. 27, Octobris.*

the laws bind all those who are within its territory, nor is it proper that as regards transactions concluded in their own country the Batavians should ignore their own law and decide the case according to foreign law. On the other hand, it is true that it will have no validity here in *Friesland*, in accordance with the third maxim, because in that way nothing would be easier than for our citizens to evade our laws, as they could be evaded every day. But elsewhere such a will would be valid, even where an unemancipated son cannot make a will, for in such a case the principle of the evasion of the laws of their country by its own citizens does not apply, for here no evasion would be perpetrated.

This illustration referred to an act which was prohibited at home on account of a personal quality. We shall give another case decided by the Supreme Court some time ago, of an act allowed at home, but prohibited where it was done. *Rudolph Monsema*, aged seventeen, made a will at *Groningen* within fourteen days after he had gone there to learn pharmacy, which he could make in *Friesland*; but at *Groningen*, according to *Dr. Nauta*, the reporter of this case, minors under the age of twenty are not allowed to do so, not even at the time of fatal illness, nor as to more than one moiety of their inherited property. He died from that illness while he was still under age, leaving his uncle on his father's side as his heir, and leaving nothing to his aunts on his mother's side, who contended that the will was void because it was made contrary to the law of the place. The heir maintained that a personal quality accompanies a person everywhere, and that the capacity which he had in his own country was effective abroad. But it was decided against the will, consistently with what we have said, especially as there was no intention to evade the law of the home country. The decision was, however, by no means unanimous, *Nauta* himself dissenting. (*Decis. MS. 134. October 27, 1643.*)

14 et 15. Fundamentum universae hujus doctrinae diximus esse et tenemus subjectionem hominum infra Leges cujusque territorii, quamdiu illic agunt, quae facit, ut actus ab initio validus aut nullus alibi quoque valere aut non valere nequeat. Sed haec ratio non convenit rebus immobilibus, quando illae spectantur, non ut dependentes a libera dispositione cujusque patrisfamilias, verum quatenus certae notae Lege cujusque Reipubli. ubi sita sunt, illis impressae reperiuntur; hae notae manent indelebiles in ista Republ. quicquid aliarum Civitatum Leges aut privatorum dispositiones secus aut contra statuant; nec enim sine magna confusione praejudicoque Reip. ubi sitae sunt res soli, Leges de illis latae, dispositionibus istis mutari possent. Hinc Frisius habens agros et domos in provincia Groningensi non potest de illis testari, quia Lege prohibitum est ibi de bonis immobilibus testari, non valente Jure Frisico adficere bona, quae partes alieni territorii integrantes constituunt. Sed an hoc non obstat ei, quod antea diximus, si factum sit Testamentum jure loci validum, id effectum habere etiam in bonis alibi sitis, ubi de illis testari licet? Non obstat; quia Legum diversitas in illa specie non afficit res soli neque de illis loquitur, sed ordinat actum testandi; quo recte celebrato, Lex Reipubl. non vetat illum actum valere in immobilibus, quatenus nullus character illis ipsis a Lege loci impressus laeditur aut imminuitur. Haec observatio locum etiam in Contractibus habet: quibus in *Hollandia* venditae res soli Frisici, modo in *Frisia* prohibito, licet, ubi gestus est, valido, recte venditae intelliguntur; idemque in rebus non quidem immobilibus, at solo cohaerentibus; uti si frumentum soli

14 and 15. We have stated and maintain that the basis of the whole of this subject is the subjection of persons to the laws of any country so long as they act therein, whence it follows that an act which is valid or invalid from the beginning is also valid or invalid elsewhere. But this principle does not apply to immovables, when regarded not as depending upon the free disposition of their owners, but as impressed with certain incidents by the law of the particular country where they are situated. Such incidents remain unchangeable in that state no matter what the laws of other states or individual dispositions may provide to the contrary, for the laws enacted relating to such property could not be varied by such dispositions without general confusion and prejudice to the state where the immovable is situated. Hence a Frisian who owns land and houses in the province of Groningen, cannot dispose of them by will, since it is prohibited there to dispose of immovables by will, and Frisian law does not operate so as to affect that which constitutes integral parts of another territory. But this is not inconsistent with what we have stated above, that if a will is validly made according to the law of the place, it operates on property situated elsewhere where it is lawful to dispose thereof by will. There is no inconsistency, since the diversity of laws in this case does not affect immovable property, nor does it refer to it, but regulates the act of making a will, and the will having been properly made, the law of the country does not prohibit that act from being valid in respect of immovable property so far as no quality impressed upon it by the law of the place is injured or diminished. This rule applies also to contracts. Frisian immovable property, sold to persons in Holland in a manner prohibited in Friesland, but valid where the sale takes place, is deemed to be duly sold. The same applies to things, which although not immovable, are attached to the land, so

Frisici in *Hollandia* secundum *lastas*, ita dictas, sit venditum, non valet venditio, nec quidem in *Hollandia* secundum eam jus dicetur, etsi tale frumentum ibi non sit vendi prohibitum, quia in Frisia interdictum est et solo cohaeret ejusque pars est. Nec aliud juris erit in successione ab intestato; Si defunctus sit Paterfamilias, cujus bona in diversi locis imperii sita sunt, quantum attinet ad immobilia servatur jus loci, in quo situs eorum est; quoad mobilia, servatur jus, quod illic loci est, ubi testator habuit domicilium, qua de re vide Sandium *lib. 4, decis. tit. (VIII) def. 7*. Sunt hae definitiones ejusmodi, ut a latiori explicatione non abhorreant, quando Statutarii Scriptores non desunt, qui de nonnullis aliter existimaverint, quos vide laudatos apud Sandium in Decisionibus praedictis, quibus adde, quae novissime tradit Rodenburgius *tract. de jur. quod orit. e Stat. divers.* inserto libro de jure Conjugum.

that if growing corn in Friesland be sold in Holland according to the lasts, as it is called, the sale is not valid, and would not be upheld even in Holland, although the sale of such corn is not prohibited there, because it is forbidden in Friesland, and is attached to the soil and is a part thereof. The same rule applies to intestate succession. If the deceased be a *paterfamilias* whose property is situated in different states, as regards immovables the law of the place in which they are situated is followed, and as regards movables, the law of the place where the testator had his domicil is applied, for which see John à Sande *lib. 4. decis. tit. viii. def. 7*.

These principles are such as would be capable of a fuller explanation, since there are writers on the Statutes who think differently on several matters, and who are cited by John à Sande in the above mentioned Decisions, to which may be added the recent work of Rodenburg—*Treatise concerning the law which arises from different Statutes* which includes his book on the *Law of Husband and Wife*.

THE TREATY OF ALLIANCE BETWEEN HIS MAJESTY IN RESPECT OF THE UNITED KINGDOM AND HIS MAJESTY THE KING OF EGYPT (Cmd. 5270)

1. This treaty was signed in London on August 26, 1936, by four United Kingdom Cabinet Ministers, as well as Sir Miles Lampson, who negotiated it in Egypt, and thirteen Egyptian plenipotentiaries, consisting not merely of members of the present Wafd Government but also of the leaders of nearly all the political parties in that country. Ratifications were exchanged in December 1936.

2. In the case of most important treaties it is necessary to go back into the past to obtain a full comprehension of their provisions. This is particularly so in the case of this Treaty of Alliance with Egypt, and therefore some account of British relations with Egypt over the past seventy years seems desirable.

(a) The situation prior to the conclusion of the Treaty

3. In the last century Egypt was a country under the suzerainty of the Ottoman Empire but enjoying by virtue of firmans of the Sultan an extensive autonomy under the rule of the Khedivial family. The construction of the Suez Canal and its opening to traffic in 1869 placed Egypt in a geographical position of very special importance.

The Capitulations.

4. As part of the Ottoman Empire Egypt became subject to the application of the capitulatory treaties concluded by the Porte.¹ The essence of capitulatory rights is that the nationals of the capitulatory Powers are (a) to a great extent removed from the application of the local law, and (b) removed from the jurisdiction of the local tribunals. In Egypt, where the local foreign communities have always been large and of great importance, a somewhat more extensive application was given by custom and usage to capitulatory rights than was ever the case in the other

¹ The capitulatory Powers were: United Kingdom (Treaty 1675), Belgium (Treaty 1838), Denmark (Treaty 1756), France (Treaty 1740), Greece (Treaty 1855), Italy (Treaties with Sardinia 1823, Tuscany 1833, Naples 1840, confirmed with Italy 1861), Netherlands 1860, Norway and Sweden 1737, Portugal 1843, Spain 1782, U.S.A. 1830, Russia 1783, Germany (Treaty 1761), Austro-Hungary (Treaty 1718). Roumania has enjoyed capitulatory rights since 1906. Under the Treaty of Berlin of 1878 Roumania has most-favoured-nation rights.

parts of the dominions of Turkey. Foreigners in Egypt were subject in jurisdictional matters to consular courts and (to a great extent) to their own national law as laid down for them by their own governments for application by those courts. In mixed cases the principle was that the court of the defendant had jurisdiction. The result was judicial chaos.

The Mixed Courts.

5. A remedy for this state of affairs was sought with great skill and pertinacity by Nubar Pasha, a minister of the Khedive Ismail. As a result of long and painstaking negotiations held in Constantinople and in Cairo, he succeeded in obtaining the consent of the capitulatory Powers to the institution of the mixed tribunals in Egypt in 1876. These tribunals are staffed partly by foreign judges, who are in the majority and who preside, and partly by Egyptian judges. The foreign judges are recruited from nationals of European Powers and from the United States. They are appointed by the Egyptian Government, but it is provided that the appointment must be approved by the government of the country of which the foreign judge is a national. Upon these tribunals was conferred jurisdiction in civil cases, other than *statut personnel* (that is to say matrimonial cases, inheritance, guardianship, legitimacy, etc.), between Egyptians and foreigners and between foreigners of different nationality. They were given only a small criminal jurisdiction in the matter of bankruptcy offences, offences against the Mixed Courts and judges themselves, and police offences and "contraventions". Criminal jurisdiction over foreigners and civil jurisdiction in *statut personnel* and in civil suits between two foreigners of the same nationality remained in the Consular Courts. The Mixed Courts were furnished with civil and commercial codes, and these codes provided for the first time a more or less uniform law for the matters covered by them for all persons in Egypt, because codes in almost identical terms were at the same time enacted for application by the Egyptian Native Courts. In 1889 the Mixed Courts were given power to render applicable to foreigners Egyptian laws and regulations in regard to certain specified matters (land, antiquities, public health, etc., and police regulations) when submitted to and approved by the General Assembly of the Mixed Court of Appeal. Later on, in 1911, the Mixed Tribunals sitting in "legislative assembly" were given certain further quasi-legislative functions. Egyptian laws and decrees which were approved by the Mixed

Courts became applicable to foreigners.¹ The Mixed Courts, however, could not deal with certain types of Egyptian legislation in this way, in particular legislation imposing taxation, and these types of Egyptian legislation could only become applicable to foreigners if expressly accepted for application to its nationals by the government of each of the capitulatory Powers.

6. The Mixed Courts, in interpreting the jurisdiction conferred upon them, decided that the foreigners over whom they had jurisdiction were not only the nationals of foreign Powers possessing capitulatory rights, but all non-Egyptians except Ottoman nationals or persons belonging to territories which formed part of the Turkish Empire. There have thus come into existence four classes of persons for judicial purposes in Egypt: (a) Egyptians, (b) Turkish nationals and persons belonging to territories formerly part of the Ottoman Empire, who stand on the same footing as (a), (c) nationals of countries not possessing capitulatory rights who are subject to the Mixed Courts in mixed civil cases but otherwise on the same footing as (a) and (b), and (d) capitulatory foreigners who go before their Consular Courts in cases not within the jurisdiction of the Mixed Courts.

7. The Mixed Courts, originally set up for five years, were prolonged quinquennially by the assent of the Powers until 1921 when they were, by the agreement of the Powers, prolonged indefinitely by an Egyptian decree of that year, subject to the right of Egypt or the other Powers to terminate their acceptance of these tribunals by giving one year's notice. They have been on the whole a most successful institution bringing great benefits to Egypt. A further interpretation of their jurisdiction under the heading of what is usually known as the "mixed interest" (that is to say, every case in which a foreigner is interested comes before the Mixed Courts although the nationality of the plaintiff and defendant alone would not produce this result), coupled with the wide extent of foreign business interests in Egypt, has had the effect of bringing before the Mixed Courts almost all the commercial litigation of the country.

The British military occupation of Egypt.

8. In 1877 the finances of Egypt became, largely through the extravagance of the Khedive Ismail, entirely unbalanced. At this time France and the United Kingdom were playing a more or less equal part in Egypt, and, as the result of their efforts but with

¹ Article 12 of the Mixed Civil Code as modified in 1911.

the co-operation of other Powers, various arrangements were made with regard to the Egyptian debt, and Khedive Ismail was deposed by the Porte. Sir E. Baring, afterwards Lord Cromer, first came out to Egypt in connexion with these financial arrangements.

9. In 1882 occurred in Egypt the military revolt of a nationalist character under Arabi. The Egyptian Government were unable to restore order, foreign lives were lost and foreign property destroyed, and as a result, after other European Powers had declined to intervene, it was British troops alone which, after the bombardment of Alexandria, were landed in Egypt to quell the revolt and to restore order. These troops came, not in opposition to the Egyptian Government, but in order to help that Government, and it was stated, at the time and many times thereafter, that their presence in Egypt for this purpose would only be temporary. Thus commenced the régime of the British military occupation of Egypt. The British troops were stationed in the two great cities of Cairo and Alexandria, the central points of communications, whence they could move where their presence was required either for maintaining internal order or for protecting Egypt's territory from foreign aggression.

10. The mission which the United Kingdom had thus taken upon herself naturally required that His Majesty's Government should exercise a certain supervision over the government of Egypt. In order to restore efficient and uncorrupt government to that country, it was found necessary that a number of British officials should be taken into the Egyptian service.¹ The most important of these officials were the Financial Adviser, the Judicial Adviser, and the Director-General of Irrigation. Further, police forces under British officers and with some European personnel were established for the two cities of Cairo and Alexandria. His Majesty's Government were represented in Egypt by an Agent and Consul-General at Cairo, and at the beginning of this new régime this post was held by Lord Cromer, to whose wise guidance in these times, as well as to the devoted services of the British advisers and officials, is chiefly due the recovery of Egypt from chaos and corruption and the establishment of the satisfactory condition which has prevailed in that country now for a number of years. Egypt was still an autonomous country under

¹ A number of excellent foreign officials of other nationalities have also been employed in the Egyptian service—particularly legal experts, and in the Department of Antiquities.

Ottoman suzerainty, but in matters of importance the advice of the British Agent was given and was expected to be followed.

11. Along with the reorganization of the Egyptian civil administration took place the reorganization of the Egyptian army, and this reorganization was carried out by entrusting to British officers commands in the Egyptian army. (The arrangements made with regard to the exercise of British supervision and control in the Egyptian army were altered in the course of subsequent years. Recently the supervision has been exercised by a British Inspector-General and his staff, British officers with certain exceptions—in particular the commands of the frontier districts—not in general holding directly executive functions.)

The Sudan.

12. In 1896 it was considered possible and desirable to recover the Sudan, which had formerly been part of Egyptian territory but which had been lost in 1883 in the Mahdist revolt, culminating in the tragic end of General Gordon at Khartoum. Accordingly operations under the command of General Kitchener were commenced which ended successfully in the recapture of the whole of the Sudan in 1898. These operations were conducted jointly by the Egyptian and British armies and the expense of the war was also shared between the two countries.

13. The time had come when the arrangements for the future of the Sudan should be made. On the one hand, the Sudan had been formerly under Egyptian sovereignty, and the object of the war as understood in Egypt was to recover this territory for the Khedive. On the other hand, though Egypt had borne her full share in the military and financial efforts necessary to recover the territory, His Majesty's Government, through British troops and money as well as a British Commander-in-Chief, had played a predominant part in securing this success. Further, it was necessary that a form of government should be set up in the Sudan which would be best calculated to prevent a recurrence of risings such as had rendered the war necessary. The southern frontier of Egypt must be made safe for the future. The solution of this problem was found in the Condominium Agreements of 1899 between the United Kingdom and Egypt, and it is no exaggeration to say that the success of that solution in achieving its objects was worthy of the statesmanship of Lord Cromer who devised its provisions.

14. This solution placed the administration of the Sudan in

the hands of a Governor-General who was nominated by His Majesty's Government and appointed by the King of Egypt. In the Governor-General are vested the whole powers of administration over the territory. Successive Governors-General have established an administrative machine in the Sudan which seems admirably adapted for the country. The administrative posts in the Sudan Civil Service have through all these years been held almost exclusively by British subjects, but until the unfortunate events of 1924, to which reference is made later, numbers of Egyptians were employed in police and technical posts in the Sudan, and Egyptian as well as British forces were stationed there. At all times the Egyptian flag and the Union Jack have been flown side by side from the Palace at Khartoum. Recently, with the development of the country, Sudanese have been more and more employed in the administration, and a Sudanese defence force has formed a more important part amongst the troops maintained in the country for defence purposes. Amongst the provisions of the Condominium Agreement were articles according Egypt a specially favoured position as regards exports and imports into the Sudan, and another provision laying down that the nationals of all European countries should be equally treated as regards residence and carrying on business in that country. It was the intention that the establishment of the Condominium administration in the Sudan should have the effect of ending the régime of the capitulations in that territory, and that this was so has been accepted by foreign capitulatory Powers and admitted in judicial decisions of the Mixed Tribunals.

Suez Canal Convention and Franco-British Declaration of 1904.

15. The Suez Canal Convention was signed in October 1888. Under it the duty of protecting the Canal is entrusted to the Egyptian Government in the first place and to the Ottoman Government in the second place. The Convention did not, however, become completely effective till 1904, when the United Kingdom reservation "as to the application of its provisions in so far as they would not be compatible with the present transitory and exceptional conditions now found in Egypt and might fetter the liberty of action of His Majesty's Government during the period of the occupation of Egypt by the forces of His Britannic Majesty" was withdrawn. (Article 6, Anglo-French Declaration of 1904.) In return for corresponding undertakings with regard to the French position in Morocco, France in 1904 declared that

she "would not obstruct the action of Great Britain in Egypt by asking that a time limit should be fixed for the British occupation or in any other manner", and the United Kingdom declared that they had no intention of altering the political status of Egypt.

16. Thus things continued in Egypt and the Sudan until the Great War. The British army of occupation in Egypt remained, and as time went on the importance of the Suez Canal as a vital artery of Imperial communications became more and more evident and the necessity of British forces in Egypt to protect the Canal from being cut by enemy forces became even clearer. These troops remained stationed principally in the two cities. In view of the absence of means of communication, there was no other position suitable in view of their dual function.

The War 1914-18: British Protectorate.

17. The result was that when Turkey came into the War, the British army were in occupation and His Majesty's Government were exercising a role of control in a territory nominally under the suzerainty of an enemy of the United Kingdom. The incompatibility of these things had to be terminated, and in December 1914 a British protectorate was established over Egypt and the Turkish suzerainty declared terminated. At the same time the then Khedive, who had shown anti-British sympathies, was deposed, and his uncle Hassein Kamel ascended the Khedivial Throne with the title of Sultan of Egypt.

18. His Majesty's Government declared in a letter to the new Sultan that the capitulations were no longer in harmony with the development of the country but that the revision of these treaties should be postponed until the end of the war. The continuance in force of the capitulatory treaties in the new circumstances was doubtful because they were treaties concluded with Turkey; and (a) as regards the Allied Powers, they were at war with Turkey, and (b) Turkey had been declared to be no longer suzerain of Egypt, being replaced by the United Kingdom as protecting Power. The Consular Courts and other exceptional jurisdictions in Egypt were continued by decree of the Sultan of February 9, 1915.

19. It is not necessary at the present time to say more about the war years except to record (i) that on November 2, 1914, the Commander-in-Chief of the British forces in Egypt assumed by proclamation martial law powers overriding capitulatory rights

where necessary,¹ and (ii) that during this time the nationalist movement in Egypt, which had come into existence before the War, grew greatly in strength and importance, and after the Armistice the movement for the establishment of complete Egyptian independence by a treaty with the United Kingdom began. Zaghoul Pasha was at this time the leader of the Egyptian nationalist movement and made efforts to achieve his aims at the Peace Conference at Paris.

The Peace Treaties.

The Peace Conference, however, confined itself to drawing up articles in the Peace Treaties under which the late enemy Powers recognized the British protectorate and renounced their capitulatory rights (Articles 147 and 149 of the Treaty of Versailles)² and recognized the transfer to the United Kingdom of the role conferred upon Turkey with regard to the defence of the Suez Canal by the Suez Canal Convention (Article 152). In 1923 by the Treaty of Lausanne Turkey renounced her old suzerainty over Egypt as from November 1914 and recognized that any questions arising from the recognition of the state of Egypt should be settled in a manner to be determined later by the Powers concerned.

20. In view of the demand in Egypt for the establishment of independence and the settlement of questions between the United Kingdom and Egypt on the basis of a treaty, and after unsuccessful negotiations in 1920 between Lord Curzon and Adly Pasha, the Milner Mission was sent to Egypt in 1921, but it failed to reach any agreement with the Egyptian Government.

The 1922 Declaration and reserved points.

21. In 1922 His Majesty's Government felt it just and necessary that some steps should be taken to meet Egyptian aspirations,

¹ The German and Austrian consular courts were closed during the war, and jurisdiction over Germans and Austrians was transferred to the British consular courts by martial law proclamation. The German and Austrian judges of the Mixed Courts were given extended leave until the end of the next quinquennial period of the Mixed Courts, when their appointments were not renewed.

² Article 149 provided that "until an Egyptian law of judicial organization establishing courts with universal jurisdiction comes into force provisions shall be made by means of decrees issued by His Highness the Sultan for the exercise of jurisdiction over German nationals and property by the British consular tribunals. In fact in 1925 an agreement was concluded between Germany and Egypt under which German consular courts were reopened and given (with certain exceptions) the same jurisdiction as before the war until the institution of a new judicial organization having jurisdiction over all foreigners in Egypt should be set up. A similar agreement was made with Austria three years later.

although it was impossible at that moment to come to an agreement about all questions by a treaty. As a result, His Majesty's Government issued in that year a unilateral declaration in which they recognized the independence of Egypt under the rule of Sultan Fuad (Sultan Hussein's successor), who should thenceforward assume the title of King of Egypt, and the British protectorate was terminated. Certain matters were by that declaration absolutely reserved to the discretion of His Majesty's Government until such time as it might be possible by free discussion and friendly accommodation on both sides to conclude agreements in regard thereto between His Majesty's Government and the Government of Egypt. Pending the conclusion of such agreements the *status quo* in all these matters was to remain intact. These matters were (a) the security of the communications of the British Empire in Egypt, (b) the defence of Egypt against all foreign aggression or interference, direct or indirect, (c) the protection of foreign interests in Egypt and the protection of minorities, (d) the Sudan.¹ The terms of this declaration were formally notified by His Majesty's Government to foreign powers.

22. As a result of this declaration Egypt acquired and exercised a greater measure of independence than she had ever held before, even if this independence was not quite complete. Egypt accredited diplomatic representatives to foreign countries and received them in return and conducted her own foreign relations. In internal matters Egypt has been self-governing. His Majesty's Government have only interfered where matters arose which concerned one of the four reserved points, or where events were developing so as to prejudice the interests reserved by these four points. These four points, however, required the maintenance in Egypt of the British army of occupation, of a certain number of British officials in the Egyptian Government services, in particular the Financial and Judicial Advisers, of police forces in the two great cities of Cairo and Alexandria, commanded by British officers and with an important foreign element in the police personnel, and of the British supervision of the Egyptian army. Further for the better protection of foreigners in Egypt the European Department of Public Security in the Egyptian Ministry of the Interior was established under a British Director-General. The representative in Egypt of His Majesty's Government retained the title of High Commissioner.

23. In 1923 an Egyptian constitution was adopted on the

¹ The operation of British martial law in Egypt was terminated in 1923.

basis of a constitutional monarchy and a parliamentary régime on a democratic basis.

Previous treaty negotiations.

24. The régime thus established in 1922 lasted till the coming into force of the new treaty—14 years. The results have not belied the confidence in Egypt which actuated His Majesty's Government in making their declaration in 1922. As the terms of the declaration itself clearly show, this régime was intended only as a temporary and provisional one. It was soon decided that the best method of settling the four reserved points would be to conclude a treaty between the two countries which should give satisfaction to Egyptian aspirations and safeguard the interests of His Majesty's Government. Since 1922 it has been the ardent desire of Egypt to conclude the treaty and settle these matters, and His Majesty's Government have been ready at all suitable times to endeavour to do so. Previous attempts to conclude this treaty in 1924 (Zaghoul Pasha and Mr. Ramsay MacDonald), 1928 (Sarwat Pasha and Sir Austen Chamberlain), 1929 (Mohammed Mahmoud Pasha and Mr. Arthur Henderson), and 1930 (Nahas Pasha, leader of a Wafd delegation, and Mr. Henderson) were unsuccessful, but in spite of these failures relations between the United Kingdom and Egypt have been friendly and it has been possible for the government of Egypt to be carried on under the régime of the reserved points; but if this has been so, it has only been because it was known and understood in Egypt that His Majesty's Government remained willing at any reasonably suitable time to conclude a treaty.

25. It is well known that in 1930 the principal reason for the break-down of the negotiations was an inability to agree with regard to the Sudan, and in this connexion it is necessary to record the regrettable events of 1924 and their results. In 1924 Egyptian nationalist agitation extended itself to the Sudan and Egyptian troops in the Sudan became centres of disaffection against the régime, and Sir Lee Stack, who was (a) the Sirdar, i.e. commander of the forces in Egypt, and (b) the Governor-General of the Sudan, was murdered. As a result of this it became necessary for the new Governor-General in the exercise of his plenary powers of administration to order the withdrawal of all Egyptian troops from the Sudan and the retirement of all or nearly all the Egyptian officials; and since that date there have been no Egyptian troops and only a comparatively small number

of minor Egyptian officials (there are 730 odd) in the Sudan. The Condominium Agreements, however, providing for the administration of the Sudan have remained in force.

26. Soon after the break-down of the 1930 treaty negotiations the Wafd Government of Nahas Pasha fell from power in Egypt and was succeeded by the government of Sidky Pasha. During Sidky Pasha's régime in office the 1923 constitution was suspended and a revised constitution introduced. (The 1923 constitution had also been suspended during the government of Mohammed Mahmoud Pasha who conducted the treaty negotiations of 1929.)

The 1936 treaty negotiations.

27. In 1935, when Nessim Pasha was Prime Minister of Egypt, the Italo-Ethiopian war took place, necessitating the taking by His Majesty's Government of a number of military precautions in Egypt. In the Abyssinian question Egypt co-operated with the League of Nations in Sanctions. These events, however, were the occasion for another powerful rise of opinion in Egypt in favour of the conclusion of a treaty with the United Kingdom, because (a) it was thought that Egypt by the loyalty of her conduct had again shown herself worthy of independence and the gratitude of the United Kingdom, and (b) it was feared (in fact without foundation) that the military precautions taken in regard to the Abyssinian war would lead the United Kingdom to take action detrimental even to the status of Egypt as it stood then, as Egyptian opinion felt had been the case during the Great War. At the end of 1935 King Fuad restored the 1923 constitution, and elections were held at which the Wafd obtained an overwhelming majority, though they did not take office until May 1936, after King Fuad's death. The movement for the conclusion of a treaty grew in strength and what was called a United Front was formed in Egypt, namely, the collaboration with the Wafd of the leaders of all the other parties in Egypt, in the demand for a treaty, and for the conduct of the treaty negotiations. It was in these circumstances that His Majesty's Government agreed to the negotiations which led to the conclusion of the present treaty. It had always been their declared policy that they were ready to conclude a treaty with Egypt when the circumstances made it possible. The formation of the United Front fulfilled entirely one of the conditions of His Majesty's Government for the conclusion of a treaty, namely, that any treaty which was concluded must be one which was

approved by persons who were entitled to speak for the real public opinion of Egypt as a whole. The negotiations were conducted in three stages: first, the military clauses which would lead to the replacement of the two first of the reserved points; secondly, the Sudan provisions leading to the elimination of the fourth reserved point; and thirdly, the other clauses relating to the position of foreigners in Egypt, which take the place of the third reserved point.

(b) *The provisions of the Treaty*

28. The provisions of the new Treaty of Alliance can now be examined and it can be seen how the various issues arising out of the past are dealt with. The treaty settlement consists of (1) the treaty proper (17 articles, some of them containing long annexes), (2) three notes signed in London (pp. 18-19 of the White Paper), (3) three notes signed in Egypt (pp. 20-1), and (4) an "agreed minute" (pp. 15-17) containing a number of small elaborations or interpretations of the articles of the treaty and the notes, which should be read with the provisions to which they refer, as well as (5) a supplementary convention to which reference will be made later.

(i) *Alliance and military matters.*

29. Under the treaty an alliance is concluded between the two countries as between equals (Article 4). The allies agree in peace time to refrain in their relations with third countries from adopting a policy inconsistent with their alliance, and if either of them is engaged in a serious dispute, to consult together with a view to the peaceful settlement of the dispute in accordance with the Covenant of the League of Nations or other treaties applicable (Articles 5 and 6). In time of war they undertake to come to each other's assistance but, whereas the United Kingdom is bound to send ships or troops to defend Egyptian territory, Egypt is only bound to defend her own territory and to afford the United Kingdom *on Egyptian territory* "all the facilities and assistance possible" including the use of ports, aerodromes, and means of communication. Further, as military precautions must be taken before war breaks out if they are to be effective, it is provided that these facilities on Egyptian territory shall be furnished not merely in time of war but also in the event of "imminent menace of war" or "apprehended international emergency" (Article 7). (There are great similarities between

these articles and the provisions of the Treaty of Alliance with Iraq of June 1930, Treaty Series No. 15 of 1931.) The obligations to give aid as an ally under this article are subject to the condition that neither ally is called upon to give assistance in breach of the Covenant of the League of Nations or of the Paris Peace Pact.

30. The treaty continues until revised by common agreement or as a result of a decision of the Council of the League of Nations given, in accordance with the provisions of the Covenant now in force,¹ on a request made by either of the parties after the expiry of twenty years. Any revision of the treaty, however, is to provide for the continuance of the alliance in accordance with the principles contained in "Articles 4, 5, 6, and 7" (i.e. those mentioned above).

31. It is further provided in Article 8² that as the Suez Canal is not only a universal means of communication but also "an essential means of communication between the different parts of the British Empire, British troops may be stationed in a zone near the Suez Canal (the land forces will be along the shores of the Great Bitter Lake and at Moascar, and the Air Force near Kantara) "with a view to ensuring in co-operation with the Egyptian forces the defence of the Canal" until either both parties agree that the Egyptian army alone is in a position to provide for the security of the Canal, or the Council of the League, on a reference by either party after twenty years, so decides. In this article, therefore, the Egyptian Government have admitted the vital importance of the Suez Canal to the British Empire and the right of the United Kingdom to be assured that it is adequately protected at all normal times in the future, either by British and Egyptian forces together or by a sufficiency of Egyptian forces alone, and in times of emergency by the forces of both countries (see under Article 7). Further, in this way the right of the United Kingdom (instead of the Ottoman Porte) to take action to defend the Canal in the second resort, which had already been recognized under the peace treaties (see paragraphs 15 and 19 above), is now recognized by Egypt, the territorial sovereign

¹ i.e. in accordance with the provisions of Article 15 of the Covenant, but, as the Council is given by the Treaty the power to *decide*, a report by the Council "unanimously agreed to by the members thereof other than the parties to the dispute" would be legally binding and not merely have the effect attributed to it by Article 15 (6) (*vide* the Opinion of the Permanent Court of International Justice in the *Mosul Boundary* Case: Publications of the P.C.I.J., Series B, No. 12).

² Articles 5 and 11 of the Treaty with Iraq offer certain analogies to the provision of this Article.

of the Canal. The numbers of British forces to be maintained in the Canal Zone in normal times are fixed at 10,000 of the land forces and, in the case of the air force, 400 pilots and the necessary auxiliary personnel. Barracks are to be built for them by the Egyptian Government and a number of roads are to be constructed so that they can move quickly from the zone to any place where they may be required. As soon as the roads and barracks are ready, the British troops will move to the Canal Zone from Cairo first and from Alexandria later.

32. The limitations as to places and numbers in this article only apply in normal times. In times of emergency Article 7 comes into play, and British troops may be sent to other places, or in increased numbers.

33. The British military occupation of Egypt is terminated (Article 1). The British control of the Egyptian Army exercised by the Inspector-General and his staff (see paragraph 11 above) is also ended (Note No. 3, p. 19), but the Egyptian Government will have the services of a British Military Mission for so long as they desire, to assist in the training of their army and air force.

34. In this way two of the reserved points of the British Declaration of 1922 (see paragraph 21 above, points (a) and (b)) were settled by agreement between the United Kingdom and Egypt, and the British interests, which rendered necessary these initial limitations on Egyptian sovereignty, safeguarded in a manner compatible with full Egyptian independence by provisions of a treaty of alliance.

35. The termination of the military occupation would have left the position of the British forces in Egypt in an indeterminate position as regards matters such as jurisdiction and taxation if these matters were not regulated by express agreement, because hitherto their status as an army of occupation had been the basis of their position with regard to all these matters. Consequently Article 9 provides for the conclusion of a supplementary convention with regard to these matters, which was in fact signed at the same time as the treaty (p. 23). Complete immunity from criminal jurisdiction and immunity from civil jurisdiction as regards matters arising out of official duties is accorded (Article 4): their camps are inviolable (Article 5), they pay certain taxes on their private property but no other taxes (Article 7). There are also detailed arrangements about arrests (Articles 9, 10, 11, and 12) and about freedom of movement and communication for these forces (Article 6).

The Sudan.

36. Under Article 11 of the treaty the condominium agreements are continued until both parties agree to alter them (see paragraphs 13-14 above).¹ The Governor-General, appointed in the same manner as before, continues to exercise all the powers of government and to appoint officials. It is agreed that the "welfare of the Sudanese" is to be the "primary aim", and the recent development of educational and national feeling amongst the Sudanese people is recognized by the provisions that officials are to be Sudanese where possible and British or Egyptian where qualified Sudanese are not available, and that British and Egyptian troops are "to be placed for the defence of the Sudan at the disposal of the Governor-General of the Sudan in addition to Sudanese troops". Some British troops are already in the Sudan. The Egyptian Government declare themselves ready to send Egyptian troops, and the Governor-General is to "give immediate consideration" to the question of the number necessary and where they should go.² The Governor-General remains otherwise unfettered in his recruitment of his officials except that it is indicated he should select some Egyptians as well as British and that merit alone is to govern advancement up to any rank of officials of either nationality once appointed.³ He will also invite the Inspector-General of the Egyptian irrigation service in the Sudan (an Egyptian official) to attend his Council when irrigation matters are under discussion.^{4 5} Egyptian immigration into the Sudan remains unrestricted except for reasons of public order and health and there is to be no discrimination between British subjects and Egyptian nationals in the Sudan in the matter of commerce,

¹ The question of sovereignty over the Sudan is reserved (Article 11 (1) last subparagraph). This has been a subject of dispute, Egypt contending that sovereignty over the Sudan remained vested wholly in Egypt, whose territory it originally was and in whose name it was recovered, and that the condominium agreements only provided for a method of administration leaving the sovereignty untouched. The United Kingdom contends that sovereignty cannot be divorced from administration in this way but lies where the responsibility for administration is situated, and that since this was shared, so was the sovereignty. The question is largely academic when the method of administration is agreed, and turns as much upon differences of view as to the criteria for sovereignty under international law as upon divergencies as to the position with regard to the Sudan itself. (N.B. Such differences of opinion about the criteria of sovereignty are largely the explanation also of the various theories with regard to sovereignty over mandated territories.)

² Minute (XVI).

³ Minute XV, p. 16.

⁴ Note 3, p. 21.

⁵ The Nile Waters Agreement of 1928 between the United Kingdom and Egypt is not referred to in the Treaty and therefore, according to its own terms, remains in force.

immigration, or the possession of property.¹ The manner in which the Sudan is to participate in international agreements is regulated in an Annex to Article 11—the Sudan's participation and the termination of that participation is to be by the joint action of the United Kingdom and Egypt and where possible the method of accession is to be adopted. In accordance with the procedure indicated in the Treaty,² the question of the indebtedness of the Sudan to Egypt was settled by an agreement signed later at Cairo on November 5, 1936 (Cmd. 5319). In this way another of the reserved points of 1922 (*d*) was settled by agreement.

Internal Order and the Protection of Minorities and Foreigners.

37. The remaining reserved point was (*c*) "the protection of foreign interests in Egypt and the protection of minorities". Article 12 of the Treaty provides that "the responsibility for the lives and property of foreigners in Egypt devolves exclusively upon the Egyptian Government who will ensure the fulfilment of their obligations in this respect", and Note 2 (page 18) states the intention of the Egyptian Government to abolish forthwith the European Bureau of the Public Security Department (see paragraph 22 above) and by stages during the next five years to dispense with the European police in the two cities (see paragraphs 10 and 22 above). There is also recorded the "oral declaration" indicating that they are free to terminate when they wish the appointments of the Financial and Judicial Advisers (see paragraphs 10 and 22).

Other Points.

38. Article 14 abrogates any existing agreements or other instruments whose continued existence is inconsistent with the provisions of the Treaty (i.e. primarily the unilateral declaration of 1922). Article 2 provides that a British Ambassador in Egypt takes the place of the High Commissioner (the change is in the title and office—the holder, Sir M. Lampson, remains the same) and that the Egyptian representative in London shall be an Ambassador instead of a Minister Plenipotentiary as hitherto. Note I provides that British Ambassadors in Egypt "will be considered senior to the other diplomatic representatives accredited to the Court of His Majesty the King of Egypt". Article 3 announces

¹ Under the Condominium Agreement the nationals of all European Powers are to be treated alike in respect of these matters. There are also in that agreement provisions as regards customs duties which give a specially favoured position to Egypt.

² Minute XVII.

the intention of Egypt to apply for membership of the League of Nations, and of the United Kingdom "recognizing Egypt as a sovereign independent state" to support this application.¹

Capitulations.

39. There remains the question of the capitulations (see paragraphs 4-7 above). Article 13 of the Treaty recites that the United Kingdom recognizes that the capitulatory régime now existing in Egypt is no longer in accordance with the spirit of the times and the present state of Egypt (H.M. Government said this for the first time in 1914, see paragraph 18 above). Egypt declares her desire for the speedy abolition of the capitulations, and both High Contracting Parties agree to a scheme to realize this aim which is set out in the annex to the article. The annex gives the outline of proposals which the Egyptian Government are to make to the capitulatory Powers and which H. M. Government are to support. On the legislative side all restrictions on the application to foreigners of Egyptian legislation, including financial legislation, are to disappear, and in consequence the legislative functions of the Mixed Courts will be abolished and they will no longer have to pronounce upon the question whether a given Egyptian law or decree which purports to apply to foreigners does or does not apply to them. In return Egypt declares that no Egyptian legislation made applicable to foreigners in the future will be inconsistent with the principles adopted in modern legislation, or—with particular reference to legislation of a fiscal nature—discriminate against foreigners, including foreign corporate bodies.²

40. On the jurisdictional side the scheme is that the Mixed Courts shall be continued for a further period as a transitional régime, and during this period they will exercise not only their existing jurisdiction but also the criminal and civil jurisdiction at present still reserved to the Consular Courts. It is, however, contemplated as a possibility that the Consular Courts may be retained by the capitulatory Powers to deal with cases of *statut personnel* (see paragraph 5 above). In these cases it is the practice in most countries to apply to foreigners the law of their

¹ Egypt became a member of the International Labour Organization in June 1936 (see *Official Bulletin of the I.L.O.*, Vol. XXI, No. 2, pp. 77-9), and of the League of Nations in May 1937.

² This undertaking, however, is not to be a matter for appreciation by the courts. Alleged violations of it are, like violations of other treaty provisions, matters to be taken up through the diplomatic channel. (Minute XVIII, p. 17.)

nationality, and, further, in Egypt even for Egyptian nationals these cases do not as a rule go before the ordinary courts but before religious tribunals. The annex concludes by reciting that there are a number of matters which will have to be settled in order to bring into force the transitional régime, and mentions amongst other points a revision of the existing law relating to the organization and jurisdiction of the Mixed Courts, the preparation of a new code of criminal procedure, the definition of the word "foreigner" for the purpose of the future jurisdiction of the Mixed Courts (see paragraph 6 above), and an increase of the personnel of the Mixed Tribunals and the Mixed Parquet, the procedure in the case of pardons and remissions of sentences passed on foreigners, and the execution of capital sentences passed on foreigners. At the end of the transitional régime Egypt is to be free to dispense with the Mixed Courts. If it is impossible to bring into effect the scheme indicated, Egypt reserves her rights with regard to the Capitulatory régime (see paragraph 18 above) and with regard to the Mixed Courts (see paragraph 7 above). Invitations to the capitulatory Powers to attend a conference for the realization of this scheme have now been issued by the Egyptian Government.¹

Disputes.

41. In Article 15 it is agreed that any difference on the subject of the application or interpretation of the provisions of the present treaty which cannot be settled by direct negotiation shall be dealt with in accordance with the Covenant of the League of Nations.

¹ The Capitulations Conference met at Montreux in April, and a convention was signed on May 8, 1937.

PROPER LAW AND ILLEGALITY IN PRIVATE INTERNATIONAL LAW

By F. A. MANN, Dr.Jur. (Berlin), LL.M. (Lond.)

I

THE rule of private international law that a contract is governed by the law by which the parties intended to contract (proper law) has acquired such universal authority and is so generally applied in the daily practice of English courts¹ and, indeed, of the courts of nearly all countries in the world,² that it is a matter of great surprise to observe that so many jurists have criticized or rejected it or even denied its existence. Westlake³ and Cheshire⁴ in England, Goodrich⁵ and Beale⁶ in America, Pillet,⁷ Arminjon⁸ and Niboyet⁹ in France, Lewald,¹⁰ Gutzwiller¹¹ and Frankenstein¹² in Germany (to mention only some of the modern representatives of that school of thought) oppose the principle¹³ and thereby create a discrepancy between practice and theory which is unusual not only in this country but also in continental countries where no principle of precedent exists.

The reasons on which this opposition is based have often been

¹ Apart from the numerous cases mentioned by Dicey(-Keith), 5th ed., pp. 628 *et seq.*, see *Marine Insurance Co. v. Assekuranz Union 1865*, 52 (1935), Ll. L.R. 16; *The Njegos*, [1936] P. 90; *International Trustee for the Protection of Bondholders A.-G. v. The King* (1937), 2 All. E.R. 164, 166 per Lord Atkin.

² Ficker, *Rechtsvergleichendes Handwörterbuch*, Vol. IV, p. 371; Haudek, *Die Bedeutung des Parteivillens* (1931), pp. 46–61, a book of which Professor M. Wolff, *Internationales Privatrecht* (1933), p. 85, rightly says that it is the “standard work” on the subject; Planiol–Ripert–Esmein, *Traité pratique de droit civil français* (1930), Vol. VI, p. 640, where a valuable discussion of the problem will be found.

³ Westlake(-Bentwich), ss. 221 and following.

⁴ *Private International Law* (1934), p. 183. Foster (*British Year Book of International Law*, 1935, pp. 84, 93) even says that the proper law “is an academic theory posing as a rule of law which is in fact non-existent and would be unnecessary if it existed”.

⁵ *Handbook on the Conflict of Laws* (1927), § 107.

⁶ *A Treatise on the Conflict of Laws*, s. 332. 2.

⁷ *Traité pratique de droit international privé* (1924), Vol. II, Chapter XXIII.

⁸ *Précis de droit international privé* (1934), pp. 253 *et seq.*

⁹ *Recueil de Cours de La Haye*, 1927, Vol. I, p. 53; *Manuel de droit international privé*, pp. 803 *et seq.*; *Répertoire de droit international* (1929), Vol. II, p. 240.

¹⁰ *Das deutsche internationale Privatrecht* (1931), pp. 196 *et seq.*

¹¹ *Internationales Privatrecht* (1931), pp. 1605 *et seq.*

¹² *Internationales Privatrecht* (1929), Vol. II, pp. 158 *et seq.*

¹³ At least in so far as it allows the possibility of a reference to, not merely incorporation of, a foreign law permitted by the municipal principle of freedom of contract: see below, pp. 101–2.

stated and often been refuted. It is said that it is by law only that the intention of the parties receives legal effect, and that it is therefore necessary to ascertain first the law which enforces that intention.¹ But this reproach of a logical error is unfounded; if a legal system, e.g. English law, allows parties to submit themselves to a certain law, it is this very system, e.g. the English, which enforces their submission.² It is then said that if there is no express or implied stipulation as to the proper law in the contract, the presumed intention, found by the Judge, is really a fiction.³ But this argument has here no more force than it would have if it was directed against *Metropolitan Water Board v. Dick, Kerr & Co.*⁴ or *Bettini v. Gye*.⁵ The further argument⁶ that the doctrine implies an embarrassing uncertainty as to the law governing the contract does not apply where there is an express provision and, apart from this case, would have force only if a more satisfactory solution was offered. The most serious charge against the subjective theory of the proper law is, however, this: that, in the words of Cheshire,⁷ it would enable "two Englishmen, when making a contract in London to be performed wholly in England, to stipulate that it should be subject in all respects to the law of Russia".

Although this reasoning is founded on somewhat unreal facts, and although it is not easy to understand why such a provision should not be admissible in so far as freedom of contract exists, it must be admitted that it touches the most serious problem created by the adoption of the subjective test, viz. the relation of a proper law determined by the intention of the parties and of the *jus cogens*.

To a certain extent, however, the answer to this objection has already been given by the advocates of the subjective theory of the proper law. Dicey, who discusses the problem admirably in his Note 22, requires the proper law to be determined by "the *bona fide* intention of the parties".⁸ This view will to some savour too much of the French doctrine of *fraude à la loi*,⁹ which is generally held to be inapplicable in this country. Therefore the

¹ Zitelmann, *Internationales Privatrecht*, Vol. I, p. 274; v. Bar, *Theorie und Praxis*, Vol. II, p. 4; and the other writers quoted above, especially the French doctrine speaking of a *cercle vicieux* (see Niboyet, *l.c.*).

² Haudek, *l.c.*, p. 6; M. Wolff, p. 85.

³ See, e.g., Niboyet, *Cours*, p. 63; Westlake, p. 290.

⁴ [1918] A.C. 119.

⁵ (1876) 1 Q.B. 183.

⁶ Beale *l.c.*, p. 1083; *L.Q.R.*, Vol. LI (1935), p. 538.

⁷ p. 183.

⁸ p. 965; see Beale, *l.c.*, p. 1080.

⁹ On which the French authors rely; see Planiol-Ripert-Esmein, *l.c.*, p. 652; Arminjon, *Précis de droit international privé* (1927), Vol. I, No. 102.

view¹ that the selection must be made reasonably and cannot be made arbitrarily, and that consequently the parties must choose one of those laws with which the transaction has a substantial point of contact, may have more to commend it.

Whichever of these tests may be preferred, they provide a workable basis and exclude some of the dangers which Cheshire emphasizes. They do not, however, safeguard the observance of all the rules of the *jus cogens* to which both, or one, of the parties may be subject. But if this was the goal, it must be pointed out that none of the theories which are meant to replace the subjective test has been able to reach it. Whether a contract is governed by the *lex loci solutionis*² or by the *lex loci contractus*,³ by the law of the residence⁴ or of the nationality⁵ of the debtor or by the law of the place "with which the transaction has the most real connection",⁶ the result will often be that a strict rule of some competing legal system is disregarded. But this result is unavoidable, because it is a necessary consequence of the fact that a transaction has an international character involving a conflict of laws, and of the fact that it must needs be brought under the head of one legal system. This being so, a law selected by the parties in good faith or reasonably cannot be regarded as less appropriate than any other system.

It is at this point, however, that certain exceptions to the general rule of the proper law are said to exist, the object of which is to defeat the possibility of disregarding the *jus cogens*.⁷ The first of these exceptions, which originate in Dicey's work, is the general "reservation clause" (Zitelmann) which may shortly be called public policy.⁸ This is rather a general principle,⁹ overshadowing the whole of any system of private international law, than an exception to the rule of the proper law, and it there-

¹ Haudek, p. 36; M. Wolff, p. 86; Melchior, *Grundlagen des deutschen internationalen Privatrechts* (1932), p. 506.

² This doctrine originates with Savigny.

³ Beale, s. 332. 4; for further references see Niboyet, *Cours*, pp. 88, 89.

⁴ v. Bar, Vol. II, p. 3, and others; see Gutzwiller, p. 1607 *et seq.*

⁵ Zitelmann, Vol. II, p. 366; Frankenstein, *l.c.* (with qualifications).

⁶ Westlake, s. 212; Cheshire, p. 183; similarly Niboyet, *Cours*, pp. 100 *et seq.*, *Répertoire*, No. 63, says: "la loi du pays où se trouve économiquement et juridiquement l'opération".

⁷ It may be noted here that it is clear law that "the mere fact that a contract is illegal by the law of a foreign state of which one of the parties is a subject will not make that contract unenforceable here, if it is an English contract and is to be construed according to English law". *Furness Withy and Co. v. Rederaktiebolaget Banco*, [1917] 2 K.B. 873, 876 per Bailhache J.

⁸ Dicey, p. 652.

⁹ *Ibid.*, p. 25.

fore does not fall within the compass of the present discussion. The other two exceptions in short are these, that "a contract (whether lawful by its proper law or not) is invalid if the making thereof is unlawful by the law of the country where it is made"¹ and that a contract (whether lawful by its proper law or not) is invalid in so far as the performance of it is unlawful by the law of the country where it is to be performed.² It is proposed to examine these two rules in the following pages, and there an attempt will be made to prove that they are unsound in principle, that they are not supported by binding authority, and that the general principle of the proper law should suffice and not be interfered with.

II

Before these exceptions are dealt with individually and in detail, it is necessary to make a few general observations which are essential to the present discussion, while not transgressing its limits.

1. It is the function of private international law to answer the question which of two or more conflicting legal systems shall prevail; on the other hand, it is the function of municipal law to state the rules which, in the case in dispute, are to be deduced from the legal system found to be applicable. If any individual law has been found to be applicable, no further question of private international law is involved and the case is governed by the duly ascertained municipal law. This fundamental distinction is often overlooked,³ and thus, as we shall see, it sometimes happens that a rule of law which really is a rule of English law of contract is expressed in terms of an English rule on conflict of laws which, in many connexions, produces serious consequences. In a recent case⁴ Lord Wright apparently stated a rule of private international law when he said "that in determining what currency is intended the general rule *prima facie* applies that the law of the place of performance is to govern". In Germany, for

¹ Dicey, p. 655; Halsbury-Hailsham, Vol. VI, p. 271; Nussbaum, *Internationales Privatrecht* (1932), p. 244.

² Dicey, p. 657; Westlake, s. 213; Cheshire, p. 201; Halsbury-Hailsham, Vol. VI, p. 272; Nussbaum, *l.c.*, p. 245; *Restatement of the Law of Conflict of Laws*, s. 360 and Beale, pp. 1261 *et seq.*; see also the recent American cases of *Anglo-Continental Treuhand A.-G. v. St. Louis Southwestern Ry. Co.*, 81 (1936), Fed. 2nd, 11, 12 (C.C.A. 2.), *Clunet*, Vol. LXIII (1936), p. 1121, *certiorari* denied April 6, 1936; *Central Hanover Bank v. Siemens and Halske*, *Bulletin de l'Institut juridique international*, Vol. XXXV (1936), p. 136.

³ Mendelssohn-Bartholdy, *L.Q.R.*, Vol. LII (1936), p. 134.

⁴ *Adelaide Electric Supply Co. v. Prudential Assurance Co.*, [1934] A.C. 122, 156.

instance, the same rule exists in the law of commercial contracts;¹ but, as in English law the place of performance is the residence of the creditor,² while in Germany it is the residence of the debtor,³ it might follow that, although a contract is entirely governed by German law, Lord Wright's statement would necessitate results which are the very opposite of what would follow if he had laid down the rule of English municipal law which he perhaps intended to express, and which would have been more appropriate in the case before him, as it had been held to be governed by English law.

2. The reference by the parties to a legal system, e.g. to French law, generally means that they intend French law to govern their contract. But this is not always so. By reference or otherwise, parties may incorporate a foreign law or parts of it into their contract which, as such, remains e.g. an English contract. This is what Zitelmann⁴ has called "*materiellrechtliche Verweisung*" (reference to an internal law) and, indeed, there are many instances in the reports which exemplify this distinction between the incorporation of a foreign law or parts of it into another, the governing law, and the reference to another law as the governing law; the former is possible within the sphere of freedom of contract given by the governing law, the latter is possible wherever there is a sufficiently close point of contact with the foreign law.⁵ The first case of "*materiellrechtliche Verweisung*" is *Este v. Smyth*⁶ where French law was read into an English marriage-settlement contract. It has been recognized in connexion with the interpretation of wills⁷ and of contracts,⁸ especially of insurance contracts,⁹ and it has also been applied where in a bill of lading reference was made to the Harter Act or similar statutes;¹⁰

¹ s. 361 Commercial Code.

² Halsbury(-Hailsham), Vol. VII, p. 195, No. 275.

³ s. 269 Civil Code.

⁴ Zitelmann, Vol. I, p. 270; Vol. II, p. 374. The distinction has become generally recognized; see Dicey, p. 45, note r; p. 693, note b; Niboyet, *Cours*, pp. 59, 60, *Répertoire*, No. 54, who distinguishes between *autonomie de la volonté* and *liberté de conventions*; Haudek, p. 4, note 3, with further references.

⁵ Unless submission to a foreign law is in itself illegal under the applicable private international law, not under the proper law: cf. *Jones v. Oceanic Steam Navigation Co.*, [1924] 2 K.B. 730, 732; see below, p. 105.

⁶ (1854), 18 Beav. 111, 123 per Sir John Romilly.

⁷ *Bradford v. Young* (1885), 29 Ch.D. (C.A.) 617; see also *Studd v. Cook* (1883), 8 A.C. 577.

⁸ *Rowett Leaky and Co. v. Scottish Provident Institution* (1926), 42 T.L.R. 331.

⁹ *Ex parte Dever* (1887), 18 Q.B.D. (C.A.) 660, 666 per Bowen L.J.

¹⁰ *Dobell v. Steamship Rossmore Co.*, [1895] 2 Q.B. (C.A.) 408; cf. *Tudor Accumulator Co. Ltd. v. Oceanic Steam Navigation Co.* (1924), 41 T.L.R. 81; *Royal Exchange Assurance*

thus, the courts read into an English contract the words of the American Harter Act 1893 "which"—as Lord Esher pointedly remarked¹—"I decline to construe as an Act, but which we must construe simply as words occurring in this bill of lading". If this differentiation between incorporation of and reference to a foreign law is borne in mind, many cases can be more easily explained.

3. Every rule of private international law consists of two parts: the set of facts which is to be connected with a certain law ("Anzukuñpfendes") and the point of contact which determines the connexion ("Anknuñpfungsbegriff"). If we regard such rules as "A will is governed by the law of the domicile", "form is subject to the *lex loci contractus*", "immovables are subject to the *lex rei sitae*", it is clear that it is the will, the form, the immovable which must be connected with a legal system through the medium of the notions of domicile, *lex loci contractus*, *lex rei sitae*, as points of contact. Sometimes it is difficult to decide whether a certain act or thing is a will, a contract, or an immovable, because the classifications of two legal systems vary. In such cases the problem arises in which of two drawers the act or thing is to be put: is the breach of a promise to marry a tort (as in French law) or a breach of contract (as in English law)? But when this question has been answered, the determination of the consequences which follow is not a further problem of classification.² The terms "domicil", "proper law", "*lex rei sitae*" are parts of a rule of national private international law, they are terms of English law and must therefore be "classified" in the sense recognized by that law. Consequently, the term "place of performance" must be understood in the English sense which, *prima facie*, refers to the place of residence of the creditor,³ not of the debtor, as many laws do; similarly, the place where a contract is made is often the place where the letter of acceptance has been posted, not, as most laws hold, where it has been received.⁴ If this view of the problem of classification is correct, it follows that serious clashes will inevitably occur the effects of which cannot be disregarded in testing the soundness of a rule of private international law.

Co. v. Kingsley Navigation Co. Ltd., [1923] A.C. 235, 239; similarly French Cour de Cassation, 5th December 1910, *Clunet*, 1912, p. 1158; also German Supreme Court, see Haudek, p. 62, note 2.

¹ *Dobell v. Steamship Rossmore Co.*, [1895] 2 Q.B. 408, 413.

² This view appears to be also adopted by Mr. Beckett, *British Year Book of International Law*, 1934, 59, 61. See particularly Professor Wolff, pp. 30, 34.

³ See above, p. 101, n. 10.

⁴ But see Cheshire, p. 181.

III

The view that a contract, the making of which is prohibited by the *lex loci actus*, is void, though under the proper law it would be valid, has been based on three lines of reasoning. The first is founded on the vested rights theory, according to which no right which has not been duly acquired is enforced or recognized by English law.¹ Even if the vested rights theory were correct on principle,² it is impossible to understand why a right under a contract should be acquired under the *lex loci actus* rather than under the proper law; if we accept Dicey's view that the proper law is the governing law, we are driven to the conclusion that the rights of the parties are acquired thereunder and that it would be wrong to give predominance to the *lex loci actus*. Another argument³ is based on the sovereignty of the state in which the contract is made; but, quite apart from the difficulty of defining the extent of sovereignty in connexion with the conclusion of contracts, this argument would necessitate the conclusion that because of the sovereignty of the state the theory of the proper law in general is wrong and that, e.g., the effects and the interpretation of a contract are also governed by the law of the sovereign, not by the proper law. The third argument is apparently based on the view that not only *mala in se* but also *mala prohibita* require international recognition. Probably Lord Halsbury's dictum⁴ that

"where a contract is void on the ground of immorality or is contrary to such positive law as would prohibit the making of such contract at all, then the contract would be void all over the world and no civilized country would be called on to enforce it"

is to be understood in that sense. It is, however, difficult to understand why *mala prohibita* should have greater international force than *mala in se* which are taken into account under the head of English public policy, but which, otherwise, have been refused international recognition by the *Missouri Steamship* case itself. Moreover, it is a matter of great difficulty to distinguish between *mala in se* and *mala prohibita* and between *mala prohibita* and other

¹ Dicey, pp. 655 note f., 17, 25.

² See Arminjon, *Précis de droit international privé* (1927), pp. 271 et seq.; *Recueil des Cours de La Haye*, 1933 (44), pp. 5 et seq. with numerous references; Nussbaum, pp. 78-80; Wahl, *Rechtsvergleichendes Handwörterbuch*, Vol. IV, pp. 336, 340, 345; Cook, *Yale L. J.*, Vol. XXXIII (1924), p. 457.

³ Nussbaum, *Internationales Privatrecht* (1932), p. 244, with certain qualifications.

⁴ *In re Missouri Steamship Co.* (1889), 42 Ch.D. 321, 336.

rules of the *jus cogens*, and it is therefore not surprising that more than 100 years ago Best J. said:¹ "the old-fashioned distinction between *mala prohibita* and *mala in se* is long since exploded".²

On the other hand, there are practical difficulties which render the acceptance of Dicey's view inadvisable. A law which renders the making of a contract unlawful is apparently³ a law which, in the strict sense of English municipal law, renders agreements illegal. But in view of the very arguments on which, as has been shown above, this exception to the proper law doctrine has been based, it cannot be admitted that in private international law the unlawfulness of a contract obtained by fraud, which in English municipal law is only voidable, should be less unlawful than a contract to practise fraud which is illegal and void.⁴ Internationally, such distinctions of the internal law of the forum are not only dangerous but valueless. Another argument against the rule is supplied by the experience that there is often a lack of substantial connexion between a commercial transaction and the *locus contractus*. If, in violation of a local statute, an English contract which is to be performed in England is made between two Englishmen who meet in a hotel in Berlin or in a restaurant-car on the way from Paris to Vienna on Belgian territory, or if a letter by which a contract between an Englishman in London and a Swiss firm in Lucerne is accepted is posted in Milan where the making of the contract would be unlawful, while nothing would be unlawful if the letter had been posted either in London or in Lucerne, Dicey's rule would invalidate the contract. It thus appears that this rule is not only based on unconvincing arguments, but also that its working is unsatisfactory, and it is therefore submitted that the subjective theory of the proper law, properly understood, should suffice to afford a satisfactory solution.

The way to such a solution is not yet barred by the authorities. Some cases can be dismissed, because they have in fact no bearing on the point⁵ or because they relate to the general rule of material validity being governed by the proper law, not to Dicey's exception.⁶ *In re Missouri Steamship Co.*⁷ is regarded as the leading

¹ *Bensley v. Bignold* (1822), 5 B. and Al. 335, 341.

² See also Pollock, *Law of Torts* (1929), p. 26.

³ *The Torni*, [1932] P. 78, 88 per Greer L.J.

⁴ *Scott v. Brown Doering McNab and Co.*, [1892] 2 Q.B. 724.

⁵ *Strauss v. Goldschmidt* (1892), 8 T.L.R. 309, 512; *In re London County Commercial Reinsurance Office*, [1922] 2 Ch. 67.

⁶ *Henry v. Riera* (1846), 11 Sim. 318; *La Rose v. Prieto* (1864), 16 C.B. 578.

⁷ (1889), 42 Ch.D. 321.

case. It concerned a contract made in Massachusetts between American citizens and a British company for the carriage of goods from Boston to England; the contract, which was held to be governed by English law, contained an exception clause which was valid in English law but void by the law of Massachusetts as being against public policy. The validity of the clause was upheld by the Court of Appeal on the ground that English law applied, and that therefore the law of Massachusetts, which created a *malum in se*, not a *malum prohibitum*, was immaterial. In Lord Halsbury's judgment the passage occurs which has been quoted above.¹ But, with due respect to that great authority, it is submitted that, in the circumstances, his statement was not more than a dictum, and, moreover, it was treated as such by Fry L.J.² and by Cotton L.J. who said:³

"As the Lord Chancellor has said, I do not enter into the question what will be the result where parties have made in America a contract which they intend to be governed by English law where according to the American law such a contract would be itself illegal. In my opinion no such point arises here."

Therefore it cannot be said⁴ that, in that case, the Court of Appeal "accepts the rule quite candidly", but, as Lord Dunedin has pointed out,⁵ the *Missouri* case amounts simply to this, that, the court having held the contract to be governed by English law, the clause in question was not void, that it could therefore receive effect, and that the fact that by the law of Massachusetts such a clause would be void was an irrelevant consideration.

In the next case, *Jones v. Oceanic Steam Navigation Co.*,⁶ the facts of which are virtually identical with those of the *Missouri Steamship* case, Lord Hewart made no reference to our problem at all; he only rejected the view that the law of Detroit made it "illegal for the subjects of another country to contract with reference to the law of that country".⁷

This leaves us with the most recent and most difficult case, *The Torni*.⁸ Goods were shipped at Jaffa by Palestinian citizens upon an Esthonian ship for carriage to Hull. The ship was under time-charter to a British firm, the Palestine agent of which was a Palestine Corporation whose directors signed and issued the bills of lading in Palestine. The bill of lading contained the clause: "This bill of lading wherever signed is to be construed in accordance with English law." In an action brought by indorsees

¹ p. 103.

² At p. 342.

³ At p. 339.

⁴ Dicey, p. 655, note f.

⁵ *Ertel Bieber v. Rio Tinto*, [1918] A.C. 260, 294.

⁶ [1924] 2 K.B. 730.

⁷ At p. 732.

⁸ [1932] P. 27; 78 (C.A.).

of the bills of lading, some Hull fruit merchants, in respect of damage to the cargo, the defendants set up various exception clauses in the bills, and, in reply, the plaintiffs pleaded that the contract was governed by the Palestine Carriage of Goods by Sea Ordinance No. 43 of 1926 which adopted the Hague Rules and provided in Clause 4:

"Every bill of lading . . . issued in Palestine which contains or is evidence of any contract to which the Rules apply shall contain an express statement that it is to have effect subject to the provisions of the said rules as applied by this Ordinance, and shall be deemed to have effect subject thereto, notwithstanding the omission of such express statement."

By their reply, the plaintiffs contended that the Hague Rules should be deemed to be written into the contract and that therefore the exceptions relied on were of no avail. Langton J.¹ held that the law of Palestine applied to the contract, and he therefore decided in the plaintiffs' favour. In the Court of Appeal the appellants' counsel argued,² *inter alia*, that insufficient effect had been given to the clause referring to English law in the bill of lading. The Court of Appeal dismissed the appeal, and the *ratio decidendi* seems to be that Palestinian law applied to the contract and that the only effect of the clause about English law was that it "directed the parties and the Courts in this country to construe the words of the Ordinance according to the rules of construction prevailing in this country".³ Similarly, Scrutton L.J. said:⁴ "Yes, here is the bill of lading with those terms in it. Now construe it according to English law." The explanation of the decision is therefore this, that English rules of construction, and only such rules, were incorporated into a contract which, in the circumstances of the case, and also in view of the terms of the Ordinance, was held to be a Palestinian contract. The decision is an example of "materiellrechtliche Verweisung".

There is, however, a passage in the judgment of Greer L.J. where he referred to the *Missouri Steamship* case in the following way:⁵

"There are observations made by Lord Halsbury and other members of the Court of Appeal which make it clear that in their judgment they were not deciding that, if a term in the contract was illegal by the law of the place where it was made, this country would fail to recognize that illegality. On the contrary, I regard the decision as meaning that, if in the country where the contract was made the contract was illegal—not merely void and unenforceable, but illegal—then the courts in this country would recognize the illegality and act in accordance with the law of the country where the contract was made."

¹ At p. 41.

³ At p. 87 per Greer L.J.

² At p. 79.

⁴ At p. 84.

⁵ At p. 88.

It is believed that these words, which seem to attach too great an importance to Lord Halsbury's dictum in the *Missouri Steamship* case, which are irreconcilable with Lord Dunedin's view of that case,¹ which were not necessary for the decision because the proper law was Palestinian, not English, and which are rightly criticized by Cheshire² as being "bold and sweeping", do not hinder the conclusion that even as regards illegality the *lex loci contractus* which is not the proper law is immaterial. This view is fortified by the fact that, in delivering the judgment of the Privy Council in *Spurrier v. La Cloche*,³ Lord Lindley affirmed it by saying:⁴

"even if the law of Jersey had been shewn to be what Mr. Dean contended it was [namely that an Arbitration Clause in a contract made in Jersey was illegal], the answer to this argument would still be that this policy is governed by the law of this country and not by the law of Jersey."

IV

As regards the influence of the *lex loci solutionis*, it must be admitted at the outset that it may have considerable force. There are many cases in which the *lex loci solutionis* is identical with the proper law;⁵ but these cases are immaterial for a discussion of Dicey's exception No. 3 which presupposes a lack of such identity. Moreover, it cannot be doubted that, whatever the proper law may be, the *lex loci solutionis* may govern the method of performance.⁶ But the role attributed to the *lex loci solutionis* in private international law should not be farther extended.

It has, however, been stated as a general rule⁷ that

"prima facie, whatever is the proper law of a contract regarded as a whole, the law of the place of performance should be applied in respect of any particular obligation which is performable in a particular country other than the country of the proper law of the contract."

Two qualifications appear to be necessary. It is one thing to say that, in the absence of any special circumstances, a contract

¹ Above, p. 105, n. 5.

² p. 201.

³ [1902] A.C. 446.

⁴ At p. 451.

⁵ *Branley v. South Eastern Railway Co.* (1862), 12 C.B. (N.S.) 64; *Lee v. Abdy* (1886), 17 Q.B.D. 309; see *British South Africa Co. v. De Beers Consolidated Mines*, [1910] 2 Ch. 502; [1912] A.C. 52.

⁶ Dicey, p. 672; *Jacobs v. Crédit Lyonnais* (1884) 12 Q.B.D. 589, 604 per Bowen L.J.; *Auckland City Council v. Alliance Assurance Co.* (1937) 1 All. E.R. 645, 655 g.

⁷ *Adelaide Electric Supply Co. v. Prudential Assurance Co.*, [1934] A.C. 122, 151 per Lord Wright. There are no such statements in the opinions delivered by Lords Atkin, Warrington, Tomlin, and Russell. Similarly, *Bailhache J. in Doulton & Co. v. Corporation of Madras*, (1920) W.N. 221.

which is to be performed in a country other than the *locus contractus* is taken to have been submitted by the parties to the law of the place of performance; if this was meant by Lord Wright (the words "prima facie" perhaps suggest such an interpretation), his dictum would indeed be supported by Lord Esher's words in *Chatenay v. Brazilian Submarine Telegraph Co.*,¹ and it would then provide a working rule for ascertaining the intention of the parties.² It would become quite a different matter if the words "whatever is the proper law of a contract regarded as a whole" were stressed, and curious results would then follow: as in a rule of English private international law the term "place of performance" must be understood in the English sense³ which generally refers to the place of the creditor's residence, it would follow that a German firm which under a clearly German contract would sell one pound of gold to an English firm, would have to deliver only 450 grammes, whereas under German law 500 grammes would have to be delivered.⁴ It therefore seems preferable to construe Lord Wright's dictum in the light of Lord Esher's words. A second, and perhaps a different, solution would be, to restrict Lord Wright's statement to questions concerning the mode of performance. Although the distinction between the substance of an obligation and the method of performance is not always easy to define, it has not only been recognized in this country⁵ but also on the Continent, especially by the Permanent Court of International Justice at The Hague,⁶ in connexion with international loans by which the creditor had been given an option to demand capital and interest in the respective currencies of several appointed places of payment (*option de change*). If, e.g., an English charterparty provided that the vessel should deliver cargo at Marseilles "always afloat . . . cargo to be taken from alongside the steamer",⁷ we should be justified in determining the meaning of these words according to the law prevailing at Marseilles.

¹ (1891) 1 Q.B.D. 79, 82, 83; see *Broken Hill Proprietary Co. v. Latham*, [1933] 1 Ch. 373, 397 per Lord Hanworth.

² This would not affect the rule that generally, in the absence of any indications as to the intentions of the parties, the *lex loci contractus* prevails: Dicey, p. 672; Cheshire, p. 189.

³ See above, p. 102.

⁴ s. 361 Commercial Code; s. 269 Civil Code.

⁵ Above, note 7; *Feist v. Société Intercommunale Belge d'Électricité*, [1934] A.C. 161; *International Trustee v. The King* (1936), 3 All. E.R. 407.

⁶ Collection of Judgments 1928-9, Judgment No. 14, pp. 41, 42; Judgment No. 15, p. 122; German Supreme Court, RGZ. 118, 370; 126, 196.

⁷ See the facts in *The Turid*, [1922] 1 A.C. 397, and Dicey, p. 691, note r.

Lord Wright's dictum also implies the correctness of the somewhat narrower rule stated in Dicey's exception No. 3 and dealing with questions of validity. It is, however, intended to submit that Dicey's exception is not a rule of English private international law.

Many cases usually quoted in this connexion really turn on the question of public policy. Having arrived at the result that some foreign law was the proper law of the contract, the courts naturally had to examine whether the application of such foreign law involved a violation of English public policy. This examination was and is necessary, regardless of the place of performance, and therefore these cases are valueless with regard to the supposed exception as to the *lex loci solutionis*. On this ground we may disregard a number of cases connected with wagering,¹ smuggling² and other³ contracts, but the case of *Foster v. Driscoll*⁴ requires closer consideration. It arose out of an undoubtedly English contract which, in the view of the facts taken by the majority of Court (Scrutton L.J. dissenting), concerned the smuggling of whisky into the United States, and was held to be unenforceable. Lawrence L.J. said:⁵

"The ground upon which I rest my judgment . . . is that [the contract's] recognition by our Courts would furnish a just cause for complaint by the U.S. Government against our Government . . . and would be contrary to our obligation of international comity as now understood and recognized, and therefore would offend against our notions of public morality."

Similarly, Sankey L.J. said:⁶

"To sum up, in my view, an English [*sic*] contract should and will be held invalid on account of illegality, if the real object and intention of the parties necessitates them joining in an endeavour to perform in a foreign and friendly country some act which is illegal by the law of such country."

*Foster v. Driscoll*⁷ is therefore a case which applies the principle laid down in *De Wütz v. Hendricks*⁸ and *Pearce v. Brooks*⁹ which

¹ *Robinson v. Bland* (1766), 2 Burr. 107; *Quarrier v. Coulston* (1842), 1 Phillips 147; *Moulis v. Owen*, [1907] 1 K.B. (C.A.) 746; *Société des Hôtels Réunis v. Hawker* (1913), 29 T.L.R. 578.

² *Holman v. Johnson* (1775), 1 Cowp. 343; *Briggs v. Lawrence* (1789), 3 T.R. 454; *Clugas v. Penaluna* (1791), 4 T.R. 466.

³ *Grell v. Levy* (1864), 16 C.B. 73; *Roussillon v. Roussillon* (1880), 49 L.J.R. 338; *Hamlyn v. Talisker*, [1894] A.C. 202; *Kaufmann v. Gerson*, [1903] 2 K.B. 114; [1904] 1 K.B. 591; *Ertel Bieber v. Rio Tinto*, [1918] A.C. 260.

⁴ [1929] 1 K.B. 470.

⁵ At p. 510.

⁶ At p. 521.

⁷ [1929] 1 K.B. 470.

⁸ (1824) 2 Bing. 316; note that *Foster v. Driscoll* is discussed in the text-books on the Law of Contracts, which would be impossible if it turned on Dicey's exception 3 (see above, p. 100).

⁹ (1866) L.R. 1 Ex. 213.

were quoted.¹ It is true that Sankey L.J. expressly approved of Dicey's exception No. 3,² but in view of the ground on which he rested his decision it cannot be said that he would have been prepared to extend it to a case where no violation of English public policy was involved.³

Another line of decisions falls under the head of the doctrine of impossibility of performance as existing in the municipal English law of contracts. *Jacobs v. Crédit Lyonnais*⁴ concerns a contract which was held to be an English contract and the performance of which was prevented by a strike in an Algerian port. This did not, however, discharge the contract; for⁵ "If inevitable necessity occurring in this country would not excuse non-performance, why should non-performance be excused on account of inevitable necessity abroad?" The effect of *Jacobs's* case has been stated by Lord Dunedin⁶ in these words: "It is an impossibility of fact, and a supervening impossibility of fact does not excuse. That is the whole decision." There are three further cases which only concerned the operation of the doctrine of impossibility of performance of an English contract and which did not involve any question of private international law,⁷ and the same observation applies to *Ralli v. Compañía Naviera Sota y Aznar*.⁸ A contract which was held to be an English contract⁹ provided that a certain payment should be made in Barcelona, where, however, when the time for payment arrived, a Spanish Statute had made it illegal to pay. The action for the recovery of the deficiency was dismissed. Lord Sterndale M.R., and Warrington and Scrutton L.JJ., quoted with approval Dicey's rule that a contract is invalid in so far as its performance is unlawful by the *lex loci solutionis*. But it is submitted that this rule was not regarded as relating to conflict of laws, but as part of the doctrine of impossibility. Lord Sterndale examined the cases concerning that doctrine,¹⁰ and Warrington L.J., quoting *Metropolitan Water Board v. Dick Kerr*,¹¹ said that, if an English

¹ At p. 512 per Lawrence L.J.; at p. 520 per Sankey L.J.

² At p. 518.

³ As to Lord Sankey's statement in *De Béeche v. South American Stores*, [1935] A.C. 148, 156, see below, p. 112.

⁴ (1884), 12 Q.B. 589.

⁵ At p. 603 per Bowen L.J.; the head-note is wrong: see *Ralli's case*, [1920] 2 K.B. 287.

⁶ *Ertel Bieber v. Rio Tinto*, [1918] A.C. 260, 294.

⁷ *Blackburn Bobbin Co. v. T. W. Allen Sons*, [1918] 2 K.B. 467; *Sargant v. Paterson* (1923), 39 T.L.R. 378; *Kursell v. Timber Operators & Contractors Ltd.*, [1927] 1 K.B. 298 (C.A.); cf. *Dist. Continental Lines S.A. v. Holt & Sons* (1932), 43 Ll. L.R. 392.

⁸ [1920] 2 K.B. 287 (C.A.).

⁹ See especially at p. 293 per Warrington L.J. (as he then was).

¹⁰ Beginning with *Paradine v. Jane* (1647), Aleyn 26; see p. 291.

¹¹ [1918] A.C. 119.

Statute had come into force later, it would have been an implied condition that the performance should not be illegal, and that the same result followed in the case of a foreign law coming into force later; Scrutton L.J.¹ rested his decision

“on the ground that where a contract requires an act to be done in a foreign country, it is, in the absence of very special circumstances, an implied term of the continuing validity of such a provision that the act to be done in the foreign country shall not be illegal by the law of that state.”

In spite of the dicta, it thus seems clear that *Ralli's* case turned on the doctrine of impossibility of performance in English law which was the proper law; otherwise it would be wrong to rely on the case for the purpose of a discussion of that doctrine in textbooks on English law of contracts.²

The importance of this distinction becomes clear, if we suppose that in *Ralli's* case the proper law was neither English nor Spanish, but, say, German. Under German law the action would probably have been successful, as German law would have held that, in view of the supervening Spanish legislation, the place of payment was no longer Barcelona, but London.³ If the rule which we regard as a rule of the English law of contracts really belonged to English private international law, this result, which seems not at all unreasonable, could not have been reached. Under the proper law of the contract the effects of illegality may be quite different; perhaps the whole contract, not only the part relating to performance, is void, perhaps the proper law does not know of any qualification of the strict rule which, in this country, has been laid down in *Paradine v. Jane*,⁴ perhaps performance elsewhere or damages can be claimed. To disregard such effects of the proper law would be necessitated by Dicey's rule, but would clearly be erroneous, and it may even be doubted whether it would agree with Dicey's intentions.⁵ At any rate, we know of no case where, the proper law being neither English nor that of the place of performance, a foreign law had to be applied and where, nevertheless, Dicey's rule has been adopted in defiance of a different rule of the proper law.

One further point may be noted: according to the usual formula a contract would be “invalid” in so far as the *lex loci solutionis* renders performance illegal. But unless there is illegality

¹ At p. 304.

² See, e.g., Anson (1929), p. 372; Halsbury-Hailsham, Vol. VII, p. 218; Sutton & Shannon (1933), p. 227.

³ Supreme Court December 5, 1922, *Juristische Wochenschrift* 1924, 1357, No. 3.

⁴ (1647), Aleyn 26.

⁵ p. 675, note h.

of purpose, as, e.g., in *Pearce v. Brooks*¹ or, in our submission, in *Foster v. Driscoll*,² the contract is discharged by supervening legislation which hinders performance, and this is what *Ralli's* case³ decides. The importance of the distinction becomes apparent when, with regard to the question of recovery of payments, the effects of invalidity and discharge are being compared.

There is reason to fear that, owing to the misstatement of the effect of *Ralli's* case, a simple rule of English law of contracts will soon have a completely different aspect. In *De Béeche v. South American Stores Ltd.*⁴ which concerned an action for a payment at Santiago de Chile where, owing to the introduction of currency restrictions, the making of such payment had become illegal, Lord Sankey said:⁵

"It cannot be controverted that the law of this country will not compel the fulfilment of an obligation whose performance involves the doing in a foreign country of something which the supervenient law of that country has rendered it illegal to do";

and later, he added:⁶

"By English law an act is illegal, if it necessitates something which is illegal."

A similar statement was made by Lord Wright delivering the judgment of the Court of Appeal in *International Trustee v. The King*⁷ which concerned the question whether a gold clause stipulated in an English contract and attached to a promise to pay U.S. dollars in New York could be enforced. Lord Wright said

"that an English court will not enforce a contract where performance of that contract is forbidden by the law of the place where it must be performed".

He relied on *Ralli's* case, on Dicey's rule approved of by Lord Sterndale in that case, and on the principle

"that it is contrary to the comity of nations that the court of one country should seek to enforce the performance of something in another country which is forbidden by the law of that country".

While in *De Béeche's* case it seems to have been assumed that "the law of this country" was the proper law of the contract,⁸

¹ (1866), L.R. Ex. 213.

² [1929] 1 K.B. 470.

³ [1920] 2 K.B. 287.

⁴ [1935] A.C. 148.

⁵ At p. 156.

⁶ At p. 160.

⁷ [1936] 3 All. E.R. 407.

⁸ *sed quaere*; probably Chilean law was the proper law, see the later case on the same facts: *St. Pierre v. South American Stores*, [1936] 1 K.B. 382, 390 per Greer L.J., 394 per Scott L.J.; and *St. Pierre v. South American Stores*, [1937] 1 All. E.R. 206; in view of Chilean legislation the result would have been the same.

English law was expressly held to apply in the latter case,¹ and it therefore appears that in both cases it would have been sufficient to apply the rule of English law of contracts as stated in *Ralli's* case and to abstain from expressing a very wide principle of conflict of laws. But, however that may be, neither Lord Sankey's nor Lord Wright's words avoid the conclusion that Dicey's exception No. 3 is wrongly formulated and that *Ralli's* case only states a rule of English law of contracts, though an important one. They have not stated more than a rule of public policy the import of which should be confined to that limited class of cases where neither English law nor the law of the place of performance but some foreign law is the proper law, and where such proper law still maintains a strict principle corresponding to that in *Paradine v. Jane*² which, if enforced, would compel an English judge to command the doing of an act in a foreign country which, under the law of that country, is illegal.

In the result, it is submitted that Dicey's exception No. 3 should be excluded from private international law and relegated to the law of contracts and that, as regards private international law, we should be content with the principle that the proper law of the contract governs all questions except that the mode of performance may sometimes be influenced by the *lex loci solutionis* and that, of course, public policy may have to be considered; particularly, it is English public policy to refuse to enforce a contract, if "the real object and intention of the parties necessitates them in joining in an endeavour to perform in a foreign and friendly country some act which is illegal by the law of such country"³ or if the *proper law* would compel the defendant to do an act which supervening legislation of the *locus solutionis* has rendered illegal.⁴

¹ p. 423. It was on this point that the decision of the Court of Appeal was reversed in the House of Lords (1937) 2 All. E.R. 164. It was there held that the contract was governed by American law, as the principle of the proper law "applies equally to contracts to which a sovereign state is a party as to other contracts" (in the same sense French Cour de Cassation, May 31, 1932, S. 1933, 1. 17). While the construction of the gold clause adopted by the Court of Appeal was *obiter* approved of by Lords Atkin, Russell, and Roche, no opinion was expressed on the question of illegality which, in view of the applicability of American law, did not arise. The authority of the remarks made on that question in the Court of Appeal is therefore distinctly impaired, though they still require attention.

² (1647) Aleyn 26.

³ *Foster v. Driscoll*, [1929] 1 K.B. 470, 521 per Sankey L.J.

⁴ *De Béeche v. South American Stores*, [1935] A.C. 148; *International Trustee v. The King*, [1936] 3 All. E.R. 407. (C.A.)

THE INTERNATIONAL STATUS OF THE FREE CITY OF DANZIG

By IAN F. D. MORROW, Ph.D.

THE embittered dispute that has arisen during the last four years between the National Socialist Senate and the Opposition over the future political order in the Free City of Danzig might seem at a first glance to be only of local importance. An attempt has indeed been made in certain quarters to confer that character upon it. It has nevertheless been robbed of any measure of success by recent developments in Danzig itself that have raised what seemed to be a purely domestic to an international issue of far-reaching significance for the future of international law and order. The challenge thrown down by the totalitarian to the democratic and constitutional conception of government in the Free City is unhappily not limited to the local political order. It strikes at the very foundations on which the international status of Danzig has rested ever since the establishment of the Free City seventeen years ago. It is therefore an implicit—if not perhaps an openly avowed—challenge to Danzig's international character. For that reason alone political developments in Danzig in the future as in the past must continue to be a matter of international concern. Hence it seems desirable to ascertain the nature of the international status of the Free City and also of the responsibilities arising out of it alike for Danzig and the League of Nations under whose protection the Free City has been placed by the Treaty of Versailles. It will also be necessary to examine the relationship in which Danzig stands to Poland, upon whom has been conferred special rights and privileges in regard both to the Free City and its harbour. The knowledge thus obtained will at least assist towards an understanding of the international significance of the issue that is being fought out in the Free City of Danzig at the present time.

I. *The Birth of the Free City of Danzig*

The politics of to-day are the outcome of the political actions of the past. Hence it may be well, before embarking upon any examination of Danzig's international status, to consider briefly the circumstances in which the Free City came into existence.¹

¹ For a full account of the history of Danzig and also of the circumstances which

The superstitious can find confirmation for their forebodings in the fact that it was the Thirteenth of President Wilson's Fourteen Points that gave birth to the modern problems of Danzig and the so-called "Polish Corridor". The Thirteenth Point stipulated that:

"An independent Polish State should be erected which should include the territories inhabited by indisputably Polish populations, which should be assured a free and secure access to the sea, and whose political and economic independence and territorial integrity should be guaranteed by international covenant."

The Peace Conference in Paris in 1919 found itself placed upon the horns of a dilemma by this demand for a "free and secure access to the sea" for Poland. Where was such an access to be found? Historical traditions as well as geographical situation pointed to Danzig as the only German port capable of serving Poland as her outlet to the sea. For not only was Danzig situated at the mouth of Poland's greatest river, the Vistula, but it had for centuries in the past served Poland as an outlet to the sea. But Danzig was indisputably German in character and traditions as well as in population. The separation of Danzig from Germany and its incorporation into the Polish State would therefore violate the principle of national self-determination. There was indeed no doubt as to the reluctance of the vast majority of the Danzig population to become Polish citizens. Mass demonstrations in Danzig itself in the winter of 1918-19 clearly showed that the great majority of the population was German in thought and feeling no less than in speech—and desired to remain German. Nevertheless, on March 12, 1919, the Commission of the Peace Conference charged with the onerous task of finding a solution to the problem of an outlet to the sea for Poland proposed the incorporation of Danzig in the Polish State. Its recommendation too obviously violated the principle of nationality to meet with acceptance. At the suggestion of Mr. Lloyd George the Conference sought and found a way out of its difficulty by means of a compromise that satisfied nobody and subsequently caused innumerable disputes.

The solution found by the Peace Conference was the separation of Danzig from Germany and its erection into a Free City under the protection of the League of Nations. It was hoped that in this way the German character of Danzig would be preserved

brought the Free City into existence cf. I. F. D. Morrow, *The Peace Settlement in the German Polish Borderlands* (Oxford University Press, under the auspices of the Royal Institute of International Affairs, 1936), Chap. II.

to the satisfaction of its inhabitants, and at the same time its harbour would be able to serve Poland as an outlet to the sea. The first of these objects was attained to the full. All that has happened in the seventeen years that have passed away since the creation of the Free City has had the effect not merely of preserving but of intensifying steadily the German sympathies of Danzig's population. It is, however, incontestable that the other object aimed at by the peacemakers has not been achieved by the settlement. For reasons which cannot be investigated here Danzig failed to afford Poland that "free and secure access to the sea" that had been promised to her.¹ Hence Poland took matters into her own hand by building her own seaport of Gdynia and promoting its growth to the increasing detriment of Danzig's sea-borne trade. The compromise effected by the Paris Peace Conference therefore failed of success. Moreover, it pleased nobody—either then or subsequently. Danzigers, Germans, and Poles have always been and still are equally dissatisfied with it. Nor has the League of Nations in its capacity as protector of Danzig any better reason for satisfaction. The name "Danzig" has seldom been absent from the agenda for the Council meetings. Time and again the Council's mediatory influence has been invoked by one or other or indeed both of the principal parties—Danzig and Poland—to the disputes that have marked and marred the Free City's early life. These disputes, however, lie outside the scope of the present inquiry. Its purpose can be served better by an examination of the treaty provisions that gave the Free City of Danzig an international legal personality.

(a) *The Treaty of Versailles.*

The Treaty of Versailles is the Free City's legal birth-certificate. Articles 100 to 108 of that Treaty contain the arrangements devised by the Paris Peace Conference for the separation of Danzig from the German Reich and its establishment as a Free City under the protection of the League of Nations. The League of Nations is represented for this purpose by a High Commissioner resident in Danzig who is "entrusted with the duty of dealing in the first instance with all differences arising between Poland and the Free City of Danzig in regard to this Treaty or any arrangements or agreements made thereunder (Article 103)". Article 103 also went on to declare that the Constitution of the Free City was to be drawn up by representatives of the Free City in agreement with

¹ For a critical analysis of these reasons, cf. *op. cit.*, Chaps. III and IV.

the High Commissioner and to be placed under the guarantee of the League of Nations. The following Article (Article 104) contains an undertaking on the part of the Principal Allied and Associated Powers to negotiate a treaty between Poland and Danzig for certain specified objects. Among these objects were the inclusion of the Free City within the Polish Customs area, the assurance to Poland of the "free use and service" of Danzig's harbour for her imports and exports, the control and administration by Poland not only of the Vistula but also of the entire railway system within the Free City, the safeguarding of the rights of Polish nationals and other persons of Polish origin and speech residing within the Free City, and, finally, the conduct by Poland of the foreign relations of the Free City as well as the diplomatic protection of its citizens when abroad.

The Treaty of Versailles therefore placed the Free City and the League of Nations in a twofold relationship. On the one hand the League was entrusted with the "protection" of the Free City, and on the other the Constitution of the Free City was placed under its guarantee. Unfortunately the drafters of these articles failed to give precise definition to the term "protection". The ink was scarcely dry upon the treaty before a violent controversy arose over the exact meaning to be given to that term in the relations between the Free City and the League of Nations as its protector. It will be necessary to return to this controversy at a later stage in the present inquiry. Meanwhile the Constitution of the Free City and the treaty negotiated by the Principal Allied and Associated Powers between Poland and the Free City—the so-called Convention of Paris, November 9, 1920—in accordance with the undertaking contained in Article 104 of the Treaty of Versailles require to be examined briefly.

(b) *The Constitution of the Free City.*

The Constitution was drafted by a Commission appointed by a Constituent Assembly that had been elected for that purpose by the Danzig population. It was passed by the Constituent Assembly on August 11, 1920, and sent to the League of Nations for its approval. The Council of the League called for certain minor amendments to be made in the draft Constitution. A controversy thereupon ensued that was typical of the relations between the Free City and the Council of the League in the years to come. So protracted were the negotiations between the two parties that it was not until May, 1922, that the League High Commissioner

in Danzig was able to convey the Council's formal assent to the Constitution that thereupon came into force. It was subsequently amended slightly in certain details, and it is in its final form, dating from July, 1930, that it will be considered here.¹

From the standpoint of the international status of the Free City the most important articles of the Constitution are those which declare that the Senate shall represent the Free City in so far as this does not conflict with the provisions made for Poland's supervision of its foreign relations, and that the Free City cannot serve as a military or naval base, erect fortifications, or authorize the manufacture of munitions or war material on its territory, unless the consent of the League of Nations has been previously obtained in each case. Other important articles for their bearing on the relations between the Free City and the League of Nations are those which require that the Senate shall furnish official information regarding the public affairs of the Free City to the Council of the League of Nations at its request, and that no amendment to the Constitution can come into force before the League of Nations has given its formal assent to it. It is also important for the present controversy in Danzig to note that any amendment to the Constitution must be passed by a two-thirds majority of the Volkstag and then receive the assent of the League of Nations before it becomes law.

(c) *The Convention of Paris, November 9, 1920.*

The Convention of Paris in its final form is a compromise, effected by a Commission appointed by the Conference of Ambassadors, between the opposing interpretations placed by Poland and the Free City upon the stipulations contained in Article 104 of the Treaty of Versailles.² In common with the Treaty of Versailles itself the Convention is lacking in precision. Too many matters of detail were held over for subsequent settlement in direct negotiations between Danzig and Poland that gave rise to interminable disputes and misunderstandings. The Convention nevertheless made an important contribution towards the regulation and definition of Danzig-Polish and Danzig-League of Nations relations. It forbade Poland to conclude any treaty or

¹ For the text of the Constitution cf. *Constitution of the Free City of Danzig in the composure of the Law of July 4, 1930.*

² For an account of these opposing points of view cf. Morrow, *op. cit.*, pp. 40-5. For the various drafts of the Convention as well as the final text cf. *Ämtliche Urkunden zum Vertrage zwischen der Freien Stadt Danzig und der Republik Polen vom 9. November, 1920.*

international agreement affecting the Free City without previous consultation with the Free City, required that the League High Commissioner in Danzig should be informed of the result of any such consultation, and conferred upon the High Commissioner the right of veto in regard to treaties or international agreements which the Council of the League of Nations deemed to be inconsistent with the provisions of the Convention or with the status of the Free City. It equally prohibited Danzig from contracting foreign loans before the previous assent of the Polish Government had been obtained for any such loans. In this instance the High Commissioner was again given a right of veto.

The rights and privileges of Poland in regard to the Free City and its harbour were safeguarded in the Convention by the inclusion of a number of special provisions. Poland was to be represented in the Free City by a "diplomatic" representative who subsequently received the title of Commissioner-General. A Polish post, telegraph, and telephone service in direct communication with Poland was to be set up in the port of Danzig. Moreover, the drafters of the Convention wisely took precautions to ensure the impartial administration of the port and waterways, as well as of the railway system serving the port, by creating a Harbour and Waterways Board composed of five Polish and five Danzig members, whose meetings were to be presided over by a President appointed by the Polish Government and the Danzig Senate acting in agreement. In the event of disagreement between the two governments the appointment of the President was placed in the hands of the Council of the League of Nations, with the proviso that only citizens of Swiss nationality should be appointed to the post. A flood of light is thrown upon the nature of Polish-Danzig relations by the mere statement of the fact that for the first fourteen years of the Free City's existence the Council was invariably called upon to make the appointment. It was not until October, 1934, that the Polish Government and the Danzig Senate agreed for the first time upon the appointment of a Dutch citizen to the post.

It will be recalled that Article 104 of the Treaty of Versailles stipulated that the Free City should be included within the Polish Customs area. This stipulation was carried into effect in Article 13 of the Convention which states:

"The Free City of Danzig is included within the Polish customs frontier; Poland and the Free City form one customs area under Polish customs legislation and tariff."

Nevertheless the administration of the customs within the area of

the Free City is carried out by Danzig officials subject to the supervision of the Polish State Customs Administration, upon which has been conferred a right of inspection in the Danzig Customs area. The Port and Waterways Board is responsible for the administration of the free zone in the port. Other articles of the Convention made provision for safeguarding the rights of the Polish minority in Danzig and for securing the Free City against repressive economic measures on the part of Poland. Article 39 contained an exceedingly important stipulation for the future relations not only of Poland and the Free City but also of the Free City and the League of Nations. It ran:

"Any differences arising between Poland and the Free City of Danzig in regard to the present Treaty or to any other subsequent agreements, arrangements, or conventions, or to any matter affecting the relations between Poland and the Free City, shall be submitted by one or the other party to the decision of the High Commissioner, who shall, if he deems it necessary, refer the matter to the Council of the League of Nations. The two parties retain the right of appeal to the Council of the League of Nations."

(d) *The Convention of Warsaw, October 24, 1921, and other arrangements affecting the status of the Free City.*

The drafters of the Convention of Paris left innumerable matters of detail for subsequent settlement in direct negotiations between the Free City and Poland. These negotiations took place in the autumn of 1921 and resulted in the conclusion of the Convention of Warsaw on October 24.¹ There is only one aspect of this Convention which calls for notice here. Articles 1 to 13 laid down regulations for the acquisition of Danzig nationality. Article 105 of the Treaty of Versailles stated that

"on the coming into force of the present Treaty German nationals ordinarily resident in the territory described in Article 100 will *ipso facto* lose their German nationality in order to become nationals of the Free City of Danzig."

Article 72 of the Constitution of the Free City declared that "the nationality of the State shall be acquired and forfeited in accordance with the provisions laid down by law", while Article 34 of the Convention of Paris said that "the conditions of naturalisation in the Free City of Danzig . . . shall be determined in agreement between the Free City and Poland". It would therefore seem that these Articles 1 to 13 of the Convention of Warsaw do in fact form a part of the constitutional law of the Free City. At

¹ For the text of the Convention cf. *League of Nations Treaty Series*, Vol. CXVI. Also cf. Morrow, *op. cit.*, pp. 46-7.

the same time it is necessary to remember that the Constitution of the Free City possesses, as it were, a dual personality. It has an international character in so far as the relationship between the Free City and the League of Nations is under consideration. It is, however, lacking in that character if the relationship between Poland and the Free City is the subject of investigation.

A matter of outstanding importance for the international status of the Free City remains for examination. It is obvious that the duty of the protection of the Free City placed upon the League of Nations by the Treaty of Versailles included that of its military and naval defence. Inasmuch as Article 5 of the Constitution prohibits the Free City from taking measures for its own defence, the League of Nations is clearly bound to make such provision on its behalf. The League of Nations was indeed conscious of its responsibility in this regard at a very early stage in the Free City's life. At a meeting of the Council on June 22, 1921, it was resolved that Poland is the Power "specially fitted to ensure . . . the defence of Danzig by land, as well as the maintenance of order on the territory of the Free City, in event of the local police forces proving insufficient".¹ At the same time the Council prudently reserved its right to invite other Powers to collaborate with Poland in the defence of the Free City. It also constituted itself, in the person of its representative the High Commissioner in Danzig, the supreme judge of whether or not a situation had arisen that demanded imperatively the taking of measures for the Free City's defence. For the resolution of June 22 went on to empower the High Commissioner to anticipate the authorization of the Council and to address a direct invitation to the Polish Government to ensure the defence of Danzig or the maintenance of order in two possible eventualities:

- "(a) in the event of the territory of the Free City being the object of aggression, threat or danger of aggression from a neighbouring country other than Poland, after the High Commissioner has assured himself of the urgency of the danger;
- "(b) in the event of Poland being, for any reason whatever, suddenly and effectively prevented from exercising the rights possessed by her under Article 28 of the Treaty of November 9, 1920."²

It is specially noteworthy that neither this resolution of the Council nor the report of the Permanent Military, Naval, and Air Advisory Commission of the League of Nations of December 1, 1920,³

¹ *Permanent Court of International Justice*, Series C, No. 55, pp. 119-20.

² *Ibid.*

³ *Ibid.*, p. 115.

upon which it was based, contemplated the possibility either of Poland's refusing to accede to the High Commissioner's demand for assistance or of Poland's being herself the aggressor. In the former eventuality the League of Nations could presumably call upon other Powers to assist in the defence of the Free City: a procedure that would doubtless hold good in the second case also. In this latter case, however, the neighbouring Power obviously indicated by its proximity to the Free City as the Power best fitted to come to Danzig's assistance would be the German Reich that at that time—and again to-day—was not a member of the League of Nations. It is of considerable interest in this connexion to note a speech by the late Lord Balfour delivered at the Council meeting on December 12, 1920, at which the Commission's report was read. Lord Balfour stated categorically that the Treaty of Versailles made Danzig a Free City and placed the responsibility for its defence upon the League of Nations. He therefore objected most strongly to placing the Free City under the military control of any one neighbouring Power as contrary to the spirit both of the Treaty and the League Covenant. His speech closed prophetically with the remark that "the strength of small states such as Danzig would be the strength of the League itself and would not depend on their inherent strength or their military alliance with a neighbouring Power".¹ It was in order to escape from the dilemma posed to it by Lord Balfour that the Council subsequently resolved that Poland was the Power "specially fitted" to undertake Danzig's defence, and at the same time withheld from it authority to take those measures deemed necessary by the Military and Naval Advisory Commission for that defence.

II. *Poland and the Free City of Danzig*

The foregoing account of the treaty stipulations in regard to the Free City and Poland has at least served to illustrate the peculiar nature of their relationship. Undoubtedly Poland enjoys very extensive rights and privileges both in regard to the harbour of Danzig and the conduct of the Free City's foreign relations. It does not, however, possess any right of interference in the internal affairs of the Free City, and the defence of the Free City has never been definitely entrusted to it, although the Council of the League of Nations has indicated Poland as the Power "specially fitted" to undertake that defence. Hence it is difficult to understand the

¹ *Permanent Court of International Justice*, Series C, No. 55, pp. 117-18.

claim advanced by certain international lawyers that Poland enjoys sovereignty over the Free City. Not only does Danzig possess its own currency, its own flag, its own police, and its own government and constitution, but even the conduct of its foreign relations is not given unreservedly into the hands of Poland. Poland cannot conclude treaties or international agreements that are contrary to the interests of the Free City, and all such agreements and treaties are subject to the supervision and veto of the High Commissioner of the League of Nations, while the control of foreigners within the territory of the Free City is a matter for the Senate alone, with the exception of certain safeguards devised for the protection of Polish nationals resident in its territory. Nor does there seem to be any better justification for the statement that Poland stands in a protective relationship to the Free City. The Treaty of Versailles clearly placed the Free City under the protection of the League of Nations—and of the League of Nations alone. Even in the vital matter of the defence of the Free City Poland possesses no express right to act of its own volition before it has received a request from the High Commissioner of the League of Nations in Danzig to undertake the Free City's defence.

It does not seem possible, therefore, in seeking to define the relationship between Poland and the Free City of Danzig, to go farther than the statement that the Free City is “grevé de servitudes en faveur de la Pologne”¹ or—if it be preferred—that Danzig *vis-à-vis* of Poland is “un véritable second et même un associé *sui generis*”.²

At the cost of a little repetition of what has already been said it will be useful to quote some passages from the Advisory Opinion³ of the Permanent Court of International Justice in 1930 upon the question: “Is the special legal status of the Free City of Danzig such as to enable the Free City to become a member of the International Labour Organization?” To this question a negative answer was given. In the course of its opinion the Court said:

“The precise scope of the protection of the Free City by the League and of the guarantee of its constitution have not been exhaustively defined.

“The general effect of the reports and resolutions adopted by the Council of

¹ Pfeuffer, R., *Die völkerrechtliche Stellung der Freien Stadt Danzig*, p. 93, quoted by Makowski, J., *Le Caractère Étatique de la Ville Libre de Dantzig*, p. 53.

² Clunet, M., in *Journal de droit international*, 1920, p. 483.

³ *Permanent Court of International Justice*, Series B, No. 18.

the League, such as those of November 17, 1920, and March 2, 1921, is to show that the duty of the League is to ensure the continued existence of the Free City on the footing on which it was established in accordance with the Treaty of Versailles, and that it was in order to enable the League to achieve this purpose that the Free City was placed under its protection and the constitution placed under its guarantee. Accordingly, the Council has declared that it is bound to ensure orderly, peaceful, and stable government at Danzig, to protect it from outside aggression and to see that without the consent of the League no fundamental change is made in the Treaty of Paris, nor any change in the constitution of the Free City. The protection of the Free City and the guarantee of its constitution would justify such claims. . . .¹

"It is now common ground between Poland and the Free City that the rights of Poland as regards the conduct of the foreign relations of the Free City are not absolute. The Polish Government is not entitled to impose a policy on the Free City nor to take any step in connection with the foreign relations of the Free City, against its will.

"On the other hand, the Free City cannot call upon Poland to take any step in connection with the foreign relations of the Free City which are opposed to her own policy. As the High Commissioner said in his decision of December 17, 1921, if Poland were obliged to do so, she would come under the domination of the Free City, and this was certainly not contemplated by the Treaty of Versailles.

"The result is that, as regards the foreign relations of the Free City, neither Poland nor the Free City are completely masters of the situation. The Free City is entitled to care for her own interests and to see that nothing is done which is prejudicial to them. Poland is entitled to care for her own interests and to refuse to take any action which would be prejudicial to them."²

III. *The League of Nations and the Free City of Danzig*

An acrimonious controversy has arisen over the exact interpretation to be placed on the term "protection" in respect of the relationship between the League of Nations and the Free City of Danzig. Nevertheless, it has been sufficiently accurately defined for practical purposes in a report made to the Council of the League of Nations by Viscount Ishii on November 17, 1920, in which he said:

"It may be well to define first the exact meaning of the terms 'Protection' of the League, and 'Guarantee' of the Constitution (of the Free City) by the League. The 'Protection' of the Free City would appear to mean that the League of Nations shall undertake to respect and maintain against all foreign aggression the territorial integrity and the political independence of the Free City of Danzig in the same way as it does for all Members of the League of Nations under Article 10 of the Covenant. This collective protection by the League of Nations implies the exclusion, save for restrictions provided at the time of the establishment of the Free City, of all individual interference by other Powers in the affairs of Danzig. . . .

¹ *Permanent Court of International Justice*, Series B, No. 18, p. 12. ² *Ibid.*, p. 13.

"It is obvious that the guarantee of the Constitution and the protection given by the League are intimately connected. The fundamental idea is that the Free City should form in the international organization of Europe a community which must be protected against all undue interference on the part of one country, and which must have its own regular existence."¹

There is therefore an expressed obligation on the part of the League of Nations to "protect" the Free City from "undue interference" from whatsoever quarter it may threaten. The fundamental issue that is being fought out in Danzig to-day is here laid bare. Interference need not necessarily take the form of armed force. There is an even more effective means in the case of a small community like Danzig intimately allied by ties of blood and sympathy with an immediate and very powerful neighbour. At the time when he gave utterance to his statement that the guarantee of the Constitution and the protection given by the League to the Free City were intimately connected Viscount Ishii cannot have been aware of its prophetic nature. For the effective exercise by the League of its protective duty in regard to Danzig depends solely upon the respect which it enforces for its guarantee of the Constitution in its present form. The challenge to the Constitution in Danzig on the part of National Socialism is simultaneously a challenge to the authority of the League as the protector of the Free City's territorial and political independence. For as long as the Constitution continues in force it is the duty of the League of Nations to insist upon respect for its provisions. That many—and among them some of the most important—of its provisions have been violated by the National Socialist Government of the Free City is a matter of common knowledge. The Permanent Court of International Justice has already condemned the Senate's actions in this regard without effecting any sensible improvement.² Moreover, the very fact that the National Socialist Government in Danzig has hitherto been unable to secure the approval of the two-thirds majority necessary for any amendment of the Constitution is in itself an additional reason for continued insistence by the League on the impartial observation of its provisions. The League of Nations is clearly intended to be the protector of all the citizens of Danzig without distinction of political or other belief.

¹ *Permanent Court of International Justice*, Series C, No. 55, pp. 96-105.

² On December 4, 1935, the Permanent Court of International Justice expressed its opinion that two decrees of August 29, 1935, issued by the Senate for the purpose of amending the penal code, were inconsistent with the Constitution. See *Survey*, 1935, Vol. I, pp. 243-4.

IV. *The International Status of the Free City of Danzig*

It may at first sight appear that the above remarks on the implications of the present strained situation in the Free City are irrelevant to the present subject. In reality, they strike at the very root of the problem of the international status of the Free City. For it has been said with great truth in these pages by a previous writer on this subject that Danzig's international status "is the result of a bold experiment in international government which has only been made possible by the institution of the League of Nations". And he adds: "While the Free City appears to possess none of the external attributes of a sovereign state, it seems impossible to deny her some international status in view of her relation to the League."¹ Even if it be impossible to do more than say with another distinguished English authority on international law that the international status of Danzig can be described but not classified,² this much at least is certain: whatever international status is possessed by the Free City depends in the last resort upon the protective relationship that joins it to the League of Nations. Any weakening of that relationship must inevitably involve a corresponding change in the international status of the Free City of Danzig.

¹ *British Year Book of International Law*, 1924, p. 100.

² Brierly, Prof. J. L., *The Law of Nations*, pp. 75-6.

CUSTOM AS A MEANS OF THE CREATION OF INTERNATIONAL LAW

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INTERNATIONAL law, like every other legal system, consists of a set of rules determining the respective powers of the subjects of law. The creation of such rules is one of the essential tasks which lie before the organs of the legal order.

This task is discharged in all countries. But in our developed societies, the social division of labour reserves to a certain number of definite organs the authority to elaborate the rules the whole of which will form the relative legal order. When an organ on which its legal order has conferred the authority of a "source" of law has declared what ought to be the attitude of the subjects of law under its authority, the manifestation of its will is in itself sufficient for the creation of an obligatory rule.

But side by side with this production of legal rules by virtue of an authority, we find, even in the most highly legal societies, another method for the creation of legal rules, another formal source of law. Here law is not made by the acts of organs with definite powers. The rules of law here get their positive quality from the fact that the subjects of law actually do observe a certain attitude in their reciprocal relations. A positive quality is given to a rule of law, not by any one act of a competent authority, but by a number of similar acts by individuals most or all of whom have no special powers—acting either by majority or by unanimity—in the matter.

This second method of the development of legal rules is clearly to be distinguished from that which we mentioned in the first place. Simplifying the matter to some extent, it might be said that in the first case the source of the legal rule lies in the authority of the agent, while in the second case the place of that authority is taken by the repetition of similar acts by subjects who originally have no powers. This second method of the development of law by the repetition of acts is what is called development by custom.¹

The creation of law by custom plays a specially important part

¹ For a fuller discussion of the general theory of the development of law, see the author's "Essai d'une théorie des sources formelles du droit international", *Revue de Droit International*, 1937.

in international law. The technique of the regulation of international relations is still rudimentary. International legislative machinery does not succeed in fully satisfying all the needs of the international community. It is therefore easy to understand that its insufficiency must give rise to an increase of the creative activity of the subjects of law themselves, and this explains the fact (which may readily be verified) of the considerable number of rules of international law whose origin must be sought in custom.

Writers on international law have remarked this fact and have devoted a large amount of work to international custom. It is true that there is another reason which has stirred, and always will stir, internationalists to take up the point. As a recent author¹ has well said, the problem of custom is so intimately connected with all the fundamental problems of law that it is impossible to treat these latter questions without an exhaustive study of the former. And unfortunately the majority of writers have been led astray by this second consideration with the result that they often study the phenomenon of custom, not as such, but with a view to finding in it the confirmation of their general theory of law. The result is that instead of an attempt to determine how the customary development of international law works, we get an interminable discussion on the point whether custom is based on the tacit consent of states or on an objective rule, external and superior to the human will. An effort is made to discover the basis of the formation of international law by custom, without any accurate knowledge of what are the subjects of law that in fact contribute to that formation.²

While fully recognizing the interest attaching to the study of the philosophic conceptions of writers on this subject, we believe that it is not here that the question which ought first of all to engage the attention of jurists, lies. When the legal character of a formal source of municipal law has to be examined, it seems quite natural that the first question to put is, what is the special process of development which has produced it? The same must be true of international custom. Custom, as a formal source of international law, is formed by the acts of certain subjects of law. We must ask ourselves, before we proceed to a more thorough analysis of the legal nature of custom, what are the subjects of law whose

¹ W. Henrich, *Zur Problematik des Gewohnheitsrechts*, Recueil d'études sur les sources du droit en l'honneur de François Gény, Paris, 1935, Vol. II, p. 276 et seq.

² The article of Professor Sfériadès ("Aperçus sur la coutume juridique internationale", *Rev. gén. dr. internat. public*, 1936, p. 129 et seq.), while full of interesting ideas, shows this tendency strongly. The article gives a full bibliography.

acts constitute international custom? We propose in the present article to devote ourselves to the study of this question, leaving aside all doctrinal discussions on the basis of custom. Our object is primarily to try to settle what are the legal rules, developed by a process of custom, of which the international judge ought to take account without going outside his normal function of applying existing law.¹

A first glance at the views of writers on our question shows how small is the definite contribution which legal doctrine has to make to the question before us. With the exception of a few writers² almost all the doctrine on the subject is limited to the statement that international custom results from similar and repeated acts by states—repeated with the conscious conviction of the parties that they are acting in conformity with law.³ Thus there would be two factors in the formation of custom: (1) a material fact—the repetition of similar acts by states, and (2) a psychological element usually called the *opinio juris sive necessitatis*—the feeling on the part of the states that in acting as they act they are fulfilling a legal obligation.

The first of these conditions is in truth the substance of the question which we have put. Clearly the necessity for requiring the repetition of acts as an element in the formation of a customary rule results from the very notion of custom as we have explained it. It should only be observed that it is not sufficient to point to states as agents of the formation of custom. Without taking sides in the very delicate controversy as to the legal personality of the state, we must nevertheless admit that it is not sufficient to say that

¹ As appears by these few remarks, our inquiry will primarily be an inquiry into positive law. For this reason we shall make use, mainly but not exclusively, of the results of the decisions of the Permanent Court of International Justice. This is not because we consider that the Court possesses a clear and satisfactory doctrine on the subject of the formal sources of international law. On the contrary we shall often have to show that its doctrine on this point is unstable and vague. But we have to take into account the fact that the Permanent Court is at the present time the general international jurisdiction. The question in which we are interested can be raised most frequently before that Court. Therefore we believe that it is important to know exactly what is the attitude of the Court as to the regular development of international custom.

² See for example the theory of Georges Scelle (*Précis du droit des gens*, Paris, 1934, Vol. II, p. 297 *et seq.*; "Essai sur les sources formelles du droit international", *Rec. Gén.*, Vol. III, p. 400 *et seq.*) which we have used as our starting-point in our own inquiries, though we cannot accept certain postulates of the learned author, which seem to us without adequate basis in positive law. See our discussion on Article 38 (3) of the Statute of the P.C.I.J. in *Revue gén. dr. internat. pub.*, 1936, p. 285 *et seq.*

See also, on one point, H. Lauterpacht, "Decisions of Municipal Courts as a Source of International Law", this *Yearbook*, Vol. X (1929), p. 65.

³ See Sfériadès, *ubi supra*, p. 138 *et seq.*

custom is created by the state. It is impossible to verify the truth of such a proposition in fact, unless we define what are the organs of the state, the individuals whose manifestations of will we can take hold of, whose business it is to translate into fact the state-activity which creates a customary rule. This is just the question which we shall have to study.

As we attempt to determine the legal organs whose acts contribute to create customary rules, we shall at the same time endeavour to examine the point whether international custom arises only from an activity which is exercised under the impression that it is required by law.

There are some very good reasons for doubt on this point. It would be enough to think of the brilliant argument of Édouard Lambert according to which the origin of this psychological conception is to be sought in the distrustful attitude as to custom taken up by canonical theory.¹ Again, it cannot be denied that the attitude of Dean Géný, usually so firm, is somewhat indeterminate as to the meaning of the *opinio juris sive necessitatis*.² And lastly it cannot be doubted that the classical doctrine has not been able to determine indisputably either the moment at which the conviction has to exist that the act that makes custom is legal, or whether the law with which the act in question has to be thought to be in conformity is positive law, or whether the conformity is to be with natural law or with considerations of expediency.³

These questions cannot be answered *a priori*. We must try to find an answer by looking at the facts. Only the study of positive law will allow us to establish, without resorting to preconceived ideas, what, on the one hand, are the subjects of law whose repeated manifestations of will create a customary rule, and, on the other hand, of which of those manifestations account must be taken when the existence of a customary rule on a given point is to be established.

I. *The International Organs of the State*

When people speak of organs creative of international customary rules, they usually think, naturally and first, of the

¹ E. Lambert, *La Fonction du droit civil comparé*, Paris, 1903, Vol. I, p. 111 *et seq.*

² Cf. F. Géný, *Méthode d'interprétation et sources en droit privé positif*, 2^{me} éd., Paris, 1919, Vol. I, p. 360 *et seq.*

³ See, on all these questions, S. Brie, Art. "Gewohnheitsrecht", in Fleischmann, *Wörterbuch des deutschen Staats- und Verwaltungsrechts*, Tübingen, 1913, Vol. II, p. 211, and W. Henrich, *op. cit.*, p. 286 *et seq.*

organs whose business it is to represent the state in the sphere of international relations. When the classical doctrine speaks of the creative activity of the state, the reference probably is to the activity of its international organs only. At any rate this is the interpretation of the theory of custom which is given by K. Strupp, one of the few supporters of the positivist school who has felt the need of defining the main lines of the theory.

For K. Strupp custom can be created only by the acts of the organs of the state who have authority to "bind the state by a treaty properly so called", such organs being, first of all and almost exclusively, the chief of the state and the minister of foreign affairs.¹

We will not, for the moment, discuss the question whether these international organs of the state are the only ones that can produce customary rules. We would rather, first of all, define the manner in which custom is derived from the acts of these first agents of the indirect creation of international rules.

The authors who see in the acts of international organs the only source of custom, look upon international custom as a true tacit contract. They are not contented with the simple repetition, which might be termed "unilateral", of acts by the international representatives of the state, they require that the acts that build custom should be "accepted" by other states.² They require in fact that there should be the formation of a real treaty, distinguished from treaties "strictly so called" only by its form; the legal rule would originate in the *acts* of the competent organs, instead of in a writing or by word of mouth.

But if this was really the only way in which customary rules were created, there would be only one source of international law—the treaty.³ The same positivist authors admit that in international law there are no special formalities whose fulfilment is a necessary condition of the validity of a treaty.⁴ A tacit pact still remains a pact. If, therefore, it is sought to claim that, in addition to the elaboration of rules of international law by contractual procedure, the activity of the international organs of the state contributes to the creation of customary rules, it must be shown

¹ K. Strupp, "Règles générales du droit de la paix", *Rec. des cours de l'Acad. de La Haye*, Vol. XLVII (1934), p. 313 *et seq.*

² See especially A. Cavaglieri, *Corso di diritto internazionale*, 3rd edition, Naples, 1934, p. 56 *et seq.* See also K. Strupp, *op. cit.*, p. 301 *et seq.*; D. Anzilotti, *Cours du droit international*, translation G. Gidel, Paris, 1929, Vol. I, p. 73 *et seq.*

³ This is Strupp's conclusion, *ibid.*, p. 301 *et seq.*

⁴ See Anzilotti, *op. cit.*, p. 367 *et seq.*

that the repetition of the acts of such organs may create rules of law in cases where the international organs of the state, by virtue of their normal authority, cannot achieve the creation of a legal rule.

Positive law allows us to discover two situations which comply with this requirement. On the one hand, there is no doubt that the repetition of similar acts of the international representatives of the state may give birth to a customary rule, and, on the other hand, general international custom arises from the fact that a certain number of treaties embody the same rule. In both cases, the creation of the rule exceeds the normal authority of the legal agents; the international organs of the state are not authorized to declare unilaterally that the contents of an international rule ought to be of a certain character; the treaty which they conclude applies as a general rule only to the signatory states, the creation of a rule binding a wider circle cannot result from the mere authority to make a treaty. In both cases the repetition of acts of the same character gives them a legal effect which those acts could not produce by virtue of the original authority of those who performed them. Let us look a little more closely to see how this first method of the development of customary international law works.

(a) *The creation of customary international rules by the repeated similar acts of the international organs of a state.* The international representatives of a state may contribute in very different ways, by their separate and independent acts, to the creation of a customary rule. A rule may arise simply from the fact that states in their mutual relations observe a certain definite attitude during a long period of time. Again, the repetition of the same propositions, contained in the declarations of chiefs of states or foreign ministers as to the general policy of their governments, gives to the rule so asserted the character of a positive rule. Sometimes declarations in this sense do not proceed from an isolated government, but from a group of governments, or from an international conference, and this gives the customary rule a more assured authority.¹

¹ See, as the most characteristic example of this method of contributing to the creation of a customary rule, the Declaration of London of January 7, 1871, consequent on the violation by Russia of the Treaty of Paris of 1856 and affirming the obligatory character of treaties. Compare certain *vœux* or resolutions of the League of Nations which have by themselves no binding force but which undoubtedly are acts which contribute to a customary rule. See, for example, the Council resolution of April 18, 1935, relating to the denunciation by Germany of Part XV of the Treaty of Versailles.

And finally the elements of the formation of a customary rule may be found in the position taken by a state on the occasion of a diplomatic conflict. The diplomatic correspondence exchanged on such an occasion and the arguments used before a judge or arbitrator, if the development of the dispute leads to the submission of the matter to the decision of a third party, supply a rich mine of information from which, if the same principles are repeatedly asserted, conclusions as to the regulation of international relationships by customary international law may be deduced.

An examination of positive law shows us many examples in which the positive character of an indisputable rule of international law is due to one of these manifestations by the international organs of the state. It is there assuredly that the positive origin of the rule *pacta sunt servanda* is to be found.¹ It is in this way too that the principle by which damage caused has to be made good, has made its way in the international order.²

The practice of states as represented by the activity of their international organs acting outside the sphere of their conventional competence, has been at all times recognized by international tribunals as a customary source of international law. Many decisions, in particular certain decisions of the most important tribunals, such as the Permanent Court of Arbitration and the Permanent Court of International Justice, are based on positive rules which the tribunals deduce from the practice of states.

Thus the Permanent Court of Arbitration bases its decision in the case of *The Carthage*³ on the rules of the law of war at sea universally accepted by states without the existence of any express or tacit agreements on the particular points considered by the Court. And again M. Huber deduces from the actual practice of states the rules on the acquisition of territories belonging to no government⁴ or on the effects of conventions concluded with native princes.⁵

¹ See the many declarations of international organs of a state confirming the obligatory character of international treaties cited by P. Chailley (*La nature juridique des traités internationaux*, Paris, 1932, p. 73), J. B. Whittton ("La Règle *Pacta sunt Servanda*", *Rec. des cours de l'Acad. de La Haye*, Vol. XLIX (1934), p. 231), and G. Scelle (*Théorie juridique de la révision des traités*, Paris, 1936, p. 24 n.).

² See the diplomatic correspondence on this question in V. Bruns, *Fontes Juris Gentium*, Series B, Section A, Vol. I, pp. 961 *et seq.*

³ Decision of May 6, 1913, p. 5.

⁴ Decision of April 4, 1928, p. 27: case of the Island of Palmas.

⁵ *Ibid.*, pp. 45 *et seq.*

The Permanent Court of International Justice similarly has recourse to an inquiry into the general attitude of international organs of states to arrive, for example, at the conclusion that it is impossible to compel a state to submit its disputes to an international procedure if it is not willing to do so.¹ On another occasion the Permanent Court infers the existence of a rule of international law from the absence of protest against a certain general practice.² At first sight we might be tempted to believe that the unilateral declarations of will by the international organs of a state are a highly important source of customary law. We must, however, avoid illusions on this point. Of the different acts of this class, a certain number, and specially those which by their very nature cannot produce any effect in the international sphere, must be eliminated.

Some declarations by heads of states or by foreign ministers are in fact intended solely for domestic consumption. The necessities of electioneering in countries with parliamentary government and the pressing necessity for every dictatorial government to keep popular sentiment in a permanent state of excitement compel governments to make declarations which have no relation to the truth of the international situation. To accept such manifestations as contributing to the formation of international custom is to risk mistake after mistake.³

On the other hand, at times, and particularly on the occasion

¹ Advisory opinion No. 5, July 23, 1923, in the case of *Eastern Carelia*: *Publications of the Permanent Court*, Series B, No. 5, p. 27.

² Decision of October 7, 1927, in the case of *The Lotus*: *Publ. of the Court*, Series A, No. 10, p. 23.

³ It will be enough to remind the reader of the strange result at which a jurist so distinguished as M. Kelsen arrives through not having made the necessary choice between the elements on the basis of which he seeks to establish the existence of a customary rule.

In an article headed "Unrecht und Unrechtsfolge im Völkerrecht" (*Zts. f. öfftl. Recht*, 1932, p. 481) M. Kelsen argues that war can only be conceived in legal theory as a reaction against a wrongful act. In his view war is always a sanction and supposes a previous violation of international law on the part of the state against which it is directed; in support of his view M. Kelsen recalls the historical fact that all states justify the wars in which they engage by a previous violation of law by their adversary. (*Ibid.*, p. 580.) We are not here discussing the theoretical value of Kelsen's system. We merely wish to remark that his appeal to legal experience proves nothing. It is true that states always claim that they are fighting for right, but these claims in no way represent the profound reasons for which they engage in war. Perorations on right and justice are only intended to obtain from their populations the moral and material support which is necessary for the conduct of hostilities. They cannot obscure the fact that in the international law of the nineteenth, and beginning of the twentieth, century the right to make war is absolutely free and does not depend on a previous violation of international law by the opponent.

of some definite dispute, the position of a state, as expressed by the acts of its organs, is so much determined by the special interests of the case that it fails to agree, not only merely with the general legal opinion, but even with the attitude adopted by that very same state on other occasions. Thus the United States, which in its relation with other American countries has always asserted that a domestic law could not be relied on against a rule of international law,¹ adopts a diametrically opposite attitude when international claims are raised which—as indeed rarely happens—conflict with American legislation.²

If account is taken of the foregoing observations, the conclusion is easily reached that the contribution made by the actual practice of the international organs of a state to the creation by custom of international rules is very small. Apart from the affirmation of some general principles, whose application should moreover be defined by other sources of international custom, it is only rarely that the activity of the international representatives of a state can escape the two dangers to which we have called attention. Is it possible to formulate a criterion which will allow us to pick out, as little arbitrarily as possible, the acts which may properly be considered to contribute to the formation of a customary rule?

It seems that here the requirement that the acts must be done with the feeling that the law is being observed should play a part. It is certain that the requirement of the *opinio juris* makes it possible to eliminate acts which, in the opinion of the actor, are important only in the domestic order as well as claims which are aimed at nothing but the support of the political needs of the state. Only—and here the correctness of M. Édouard Lambert's remark is particularly evident—the necessity for adopting, in relation to this method of developing customary law, the psychological theory of custom comes in the end to deprive customary law of a great part of its importance in quantity. What of the formation of international custom by the adoption of the same rules in a certain number of treaties?

¹ See, for example, the point of view of the American Government in the cases of *Montijo* (Moore, *Internat. Arbitrations*, p. 1921) and *Van Bokkelen* (*ibid.*, p. 1807).

² See the American argument, which the Court did not accept, in the case of the Norwegian claim against the U.S. (Permanent Court of Arbitration, October 13, 1922, p. 140) and the position of the U.S. in regard to China, when there was a clash between the American legislation of 1882 and 1884 and the earlier Sino-American treaties (Moore, *Digest*, Vol. IV, p. 187). See also other cases in the same sense in Lauterpacht, *op. cit.*, p. 83.

(b) *Customary international principles deducible from treaties.* International practice in legal matters readily admits that the repetition of the same rules in a certain number of treaties confers on those rules a legal value even beyond the legal systems of the signatory states. Frequent examples are to be found in cases before both the Permanent Court of Arbitration and the Permanent Court of International Justice.

Thus the Permanent Court of Arbitration in the case of the *Muscat Dhows*¹ held that the principles established in certain treaties on the capitulations contained the general law on the point and applied to similar situations even where the texts were silent.

This method of arriving at a customary international rule is even more frequently used by the Permanent Court of Justice. It began to do so in its first decision; in the case of *The Wimbledon* the court inferred, from the identity of the terms of the documents by which the conditions of the Suez and Panama Canals were established, the existence of a customary international rule by which the neutrality of a state is not imperilled if it allows the passage, through an international waterway, of ships carrying munitions to another state which is at war with a third state.²

In other cases the Permanent Court of Justice has deduced from similar stipulations of several treaties, either certain positive rules as to international river law,³ or the principle of respect for private rights.⁴

But although the highest international judicial authorities repeatedly supply evidence for the formation of international law by the repetition of the same clauses in a number of treaties, we do not believe, here or elsewhere, that this method of developing law gives us an infallible principle for deducing customary international rules. The practice of the Court itself shows us the difficulties that occur where the attempt is made to establish the exact significance of the fact that a certain stipulation is to be found in a great number of treaties.

Obviously such a fact can be interpreted as meaning that the stipulation in question is only the expression of a general legal opinion. But equally it is not impossible to consider these express

¹ Decision of October 13, 1904, p. 64.

² Decision of August 17, 1923. *Publ. of P.C.I.J.*, Series A, No. 1, p. 25.

³ Decision of September 10, 1929 (Jurisdiction of International Oder Commission), *Publ. of P.C.I.J.*, Series A, No. 23, p. 27.

⁴ Advisory Opinion of September 10, 1923 (German colonists in Poland), *Publ. of P.C.I.J.*, Series B, No. 6, p. 38.

stipulations as so many exceptions to the ordinary law. A difficulty of this kind arose before the Permanent Court in *The Lotus* case. M. Basdevant, the agent of the French Government, claimed that once the conventions for the repression of crimes committed on the high seas reserved, contrary to their own object, exclusive jurisdiction to the state of the flag, the authority of that state should be considered as established by the general law.¹ On the other hand, the Court declared that the reservation of the jurisdiction of the flag might be looked upon either as the maintenance of the general law or as the counterpart of the extraordinary jurisdiction which these conventions conferred on the state-owned ships of a particular country in respect of ships of another country.²

The uncertainty which results from the possibilities of contradictory interpretations narrows considerably the domain of the influence of this new method for developing customary law from the acts of the international organs of a state. And it must be admitted that here we cannot derive any criterion from the mental attitude to law of the customary international agents. No *opinio juris* governs the birth of this class of customary rules. When agents of a state sign a treaty, they do not intend to obey existing law. They are making new law. The principles deducible from a group of similar treaties are influenced by reasons of legal policy.

It is even possible that in the application of rules deducible from stipulations in conventions, the judge will allow himself to be guided by his estimate of the reasonableness or convenience of the rules in question. Certain statements of the Permanent Court in the case of *The Wimbledon* perhaps allow us to consider this solution. But the tendency is certainly not very pronounced, so that in the last analysis it is the subjective interpretation of the judge which decides whether the repetition of the same rules in treaties has succeeded in making a customary rule. But if so we are faced with the creation of law by judges and not a manifestation of the activity of the international organs of the state.

As to these latter, we have just seen that their participation in the customary creation of international law gives only mediocre results. If, in conformity with the view of the classical authorities,

¹ *Publ. of P.C.I.J.*, Series C, No. 13, Vol. II, p. 78.

² *Ibid.*, Series A, No. 10, p. 27. See also a similar difficulty which arose as to the interpretation of the clauses contained in arbitration treaties as to compensation for damage, Decision No. 8 (Chorzow Factory), *Ibid.*, Series A, No. 9, p. 21.

international custom could only result from the acts of the international organs of the state, it certainly could play no part in the evolution of international law. Only by freeing ourselves from preconceived ideas do we have no difficulty in seeing that other elements make a much more active contribution to the customary development of international law, and that international custom, far from being a negligible quantity, is composed of a mass of rules applicable to the most different spheres of action. We will establish this observation first of all in relation to the activity of the collective international organs.

II. *The Formation of Custom by Collective International Organs*

Among collective international organs, there are some which have a rule-making authority which allows them in a very narrow sphere to make international law. By a repetition of similar acts they come to enlarge the sphere of their law-making activity.

Other organs, with executive or governmental authority, or exercising the function of a judicature, cannot directly create legal rules. Nevertheless, they are highly important factors in the customary development of international law. What is the character of the procedure, and what is the productivity of this group of customary international sources?

(a) *Collective international organs with a law-making authority.*

A law-making authority of an international organ exists, as a general rule, by virtue of a treaty which limits its sphere and defines its conditions. It is only with difficulty that states agree to delegate to collective organs their direct prerogative for the enactment of international law. When they do so delegate, they are exceedingly parsimonious in the cession of their rights, they either reserve the right to ratify the decision of the international organs or allow, on matters of very small importance only, an independent exercise of the power of making rules. In face of this restrictive attitude of states, the collective international organs seek to strengthen their independence by extending their authority by custom to spheres from which it was originally excluded.

This tendency may be observed first in the formation by custom of the rules of procedure which are common to all international conferences. Thus the rule of unanimity applied by successive conferences individually is now considered a rule of positive law.¹

¹ Cf. Advisory Opinion of *P.C.I.J.*, No. 12, November 21, 1925 (*Mosul case*), *Publ. of P.C.I.J.*, Series B, No. 12, p. 30. And see other examples to the same effect in M. Sibert,

In another sphere, the results of this customary mode of development of international law are certainly more important. The actual practice of an international organism may come to pass beyond the limits laid down by its charter. An interesting example of such a development is given by the history of the Universal Postal Congress.

The Postal convention prescribes that the validity of the acts of the Congress should depend on their ratification by the members, but the Congress does not accept the unanimity rule and takes its decisions by a majority vote. The decisions are immediately applicable and states which are in opposition must either accept conventions which have been concluded without their consent or leave the Union. The advance on the usual limitations of the powers of international organs is in this case very real; it has been made by an effective practice of the organ itself, that is by a procedure of a customary nature. The reality of this modification, by custom, of the authority of an international organ is so clear that when a great power—France—one day found itself in disagreement with the Postal Congress, it had, nevertheless, to accept a convention which had been worked out without its own concurrence.¹

It must be added that in all these cases the customary rule was the result of concrete acts. No trace is to be found of any feeling on the part of those concerned that they were acting in conformity with law. In the case of the Postal Congress custom modified an established rule and was determined by the will of an international organism acting in such a way as to change, in a definite matter, a regulation that limited its authority.

(b) *Collective organs with governmental or executive authority.* With these new customary international agents we reach a new class quite distinct from those the activities of which we have just examined. Up to this point we have been dealing with subjects of law that possessed powers of their own for the creation of legal rules. Their activity in relation to custom was only subsidiary. When we come to organs of executive authority the situation changes. They have no direct legislative power. On the other hand the duties which they perform lead them to intervene constantly in the application of abstract rules fixed by other organs with

"Organisation et technique des conférences internationales", *Rec. des cours de l'Acad. de La Haye*, Vol. XLVIII (1934), p. 389.

¹ See, on the Universal Postal Congress, F. O. Wilcox, *The Ratification of International Conventions*, London, 1935, pp. 299 *et seq.*

legislative powers. Such an intervention gives the general rule greater precision. If in the discharge of their duties executive organs always observe the same attitude, the repetition of their acts leads to the creation of a customary rule governing the legal relationships which fall under the authority of the organ in question.

It is in this fashion that the Council of the League of Nations in particular has evolved in its practice an interpretation of a large part of the Articles of the Covenant—an interpretation which often has profoundly affected their operation. It is enough to mention the practice of the Council in relation to Article XI, the result of which has been to make completely inoperative a provision the correct application of which might have proved in the hands of the League an effective weapon in the service of peace. The interpretation of Article XI given by the Council, although clearly contrary to the intention of the authors of the Covenant, nevertheless so definitely constitutes the positive law on the subject that all proposals for the reform of the Covenant look upon a return to the original meaning of the provision as a modification of the law in force.

It is indisputable that the formation of this minimizing custom has been carried into effect by nothing except the constant attitude of the Council of the League of Nations. The proceeding in question contained no psychological element. The Council could not have believed that it was applying faithfully the law in force. Its action was determined only by the weakness inherent in the present condition of the international community, that is to say by reasons of social order.¹

Further examples of a customary formation of the rules of international law are supplied by the practice of organisms whose task is perhaps less ambitious but which contribute, nevertheless, very effectively to the progress of international relations. We refer to organisms whose business it is to administer common interests of international society. When a doubt arises as to the extent of their authority, it is their own constant practice which supplies the necessary elements for the solution of the difficulty. In a recent case the Permanent Court of International Justice expressly recognized the possibility of thus determining by custom the authority of an international administrative organ.²

¹ See on all these questions the author's study of "L'Article XI du Pacte de la Société des Nations", *Rev. gén. dr. int. publ.*, 1935, pp. 559 *et seq.*

² Advisory Opinion, No. 14, December 8, 1927 (jurisdiction of the European Commission of the Danube between Galatz and Braila), *Publ. of the P.C.I.J.*, Series B, No. 14, pp. 27 and 41.

It is perhaps in this very sphere that the customary development of international law may some day give the most considerable results. The continually increasing interdependence of purely human relations in the international order involves closer and closer regulation. The technique of international legislation is certainly not capable of answering such requirements. It should be the business of the international organs themselves to work out in their customary procedure, by a coherent practice, an international administrative law. Moreover, it would not seem that in a sphere where the redoubtable spectre of state sovereignty is least involved states would wish to oppose such a development.

These, however, are but visions of the future of which at the present day we can see only beginnings of realization. In modern positive law the greater number of customary international rules are always the result of the activity of judicial organs.

(c) *Decisions of international courts as factors in the evolution of custom.* It is easy to establish by a simple piece of logical reasoning that the judge may be considered as the author *par excellence* of custom. He it is as a general rule who has the task of defining the content of an abstract rule of positive law. Given the generally conservative character of judges, it may be presumed that this labour of definition will go on the same lines. Similar decisions of a judge given in similar situations are thus capable of giving rise to customary rules.

The observation of the facts confirms this reasoning. Whether it is a question of international procedure (which is indisputably the province of the judge), or whether it is a question of rules of substantive law, we observe that important rules have only become positive legal rules because they have been declared to be such by a great number of decisions.

This is particularly the case with certain rules of procedure of the Permanent Court which were not defined either by the Statute or by the Rules of the Court. Their present shape has been evolved in the practice of the Court.¹ On a more general question equally, it is the course of international decisions which has laid down the principle that a party to litigation cannot

¹ See, as to the practice of the Court in relation to its Orders, W. Rothholz, "La Nature juridique des ordonnances de la C.P.J.I.", *Rev. gén. dr. int. publ.*, 1936, p. 643; and, as to the nomination of judges *ad hoc* in the practice of advisory opinions, the present writer's article "Compatibilité de certains décrets-lois Dantzikois avec la Constitution de la Ville Libre", *ibid.*, 1936, p. 450, and his note on the opinion of the P.C.I.J. of December 4, 1935, *Rec. gén. périodique et critique des décisions, conventions et lois relatives au droit international publique et privé*, 1936, p. 17.

plead against another party the fact that the latter has not resorted to a proceeding the resort to which was barred by an illegal act for which the former party was responsible.¹

Again decisions of courts have worked out the rules at present in force on the interpretation of treaties.² The same remark may be made as to even the most fundamental rules of law. Thus the whole theory of liability is the work of international legal decisions.³

The customary activity of the international judge is as productive in the sphere of the legal condition of territory⁴ as in that of the position of aliens.⁵ The list could be prolonged indefinitely.

It is easily understood that in this situation jurists should incline to see in case-law⁶ the one and only factor in the customary evolution of law. The tradition of Austin in England and the efforts of Édouard Lambert in France are clearly directed to this end. Our belief is that this tendency is greatly exaggerated. We have shown that in certain cases custom is developed solely by the action of certain subjects of law without the judge being called on to take a share in its evolution, and we shall find other examples in the same sense. For this reason, in spite of the importance of the part played by case-law in the development of law, our view is that, while case-law is perhaps the most effective element, still we cannot overlook in favour of the international judge the share of other factors in the making of international custom.

In any case the creation of legal rules by custom by the action of the international judge is an incontestable positive fact. In view of the abundance of this creation and the resulting progress

¹ Compare the decision of the Court of July 26, 1927 (Case of Chorzów, Jurisdiction), *Publ. of the P.C.I.J.*, Series A, No. 9, p. 31.

² See the recent work of Marcelle Jokl, *De l'interprétation des traités normatifs d'après la doctrine et la jurisprudence internationales*, Paris, 1936.

³ See the works of a general character dealing with this question. It will be seen that almost all the rules in this matter have been evolved by decisions in arbitrations. See also declarations in this sense in the decisions of the Permanent Court, Judgment No. 8, July 26, 1927 (Chorzów, Jurisdiction), *Publ. of the P.C.I.J.*, Series A, No. 9, p. 21; Judgment No. 13 of September 13, 1928 (Chorzów, Merits), *Ibid.*, Series A, No. 17, p. 47.

⁴ It is enough to mention here the part played in the theory of occupation by decisions like that of M. Huber in the case of the Island of Palmas (April 4, 1928) and by the Judgment of the *P.C.I.J.*, April 5, 1933, in the case of Eastern Greenland (*Publ. of the P.C.I.J.*, Series A/B, No. 53).

⁵ See E. Borchard, *Diplomatic protection of citizens abroad*, 1928, and Ch. de Boek "L'Expulsion", *Rec. des cours de l'Acad. de la Haye*, Vol. XVIII (1927), p. 445.

⁶ *Jurisprudence* in the original (French) text. [Translator's note.]

of international law it is indispensable to examine somewhat more carefully the process which is proper to this method of the elaboration of customary law. In this respect a very interesting evolution may be observed in the history of international case-law.

At the beginning of the evolution of activity in arbitration, arbitrators found themselves confronted by an absolute vacuum. Apart from treaties, only a few rules are to be found resulting from the practice of states, with all the hazards of this method for working out law to which we have called attention. Arbitrators make good this deficiency either by frequent reference to the theories of writers which at this moment are playing the part almost of a real source of international law or by the use of arguments based on good sense and equity.¹ Sometimes, when the decision is given by an institution which is connected with some definite municipal system, the judgment follows the proper domestic law of the arbitrator or even Roman law.²

As time passes the mass of decisions defines the principles of international law and at the same time modifies their rigidity. In the end a body of doctrine emerges to which later arbitrators refer.³ These appeals to precedent, these reciprocal references, are in truth the way in which rules of law are created by customary case-law. When a certain number of decisions have given one result we can be sure that we have before us a positive legal rule which is capable of asserting itself on all later occasions.

The tendency to give a special definiteness to customary rules resulting from case-law is specially visible in the attitude taken by the Permanent Court of Arbitration. When that Court affirms the existence of a customary rule it seeks to support its opinion by a reference to earlier decisions.⁴ As, moreover, the Court often indicates its authorities it is easy to find the very procedure by which a rule has been worked out or observe how each new decision defines and shapes the raw material which its predecessors hand down to it.

In this evolution of a rule by successive decisions is it possible to discover in judges the feeling that they are applying existing law? Does the *opinio juris* form an element in the validity of a customary rule when the judge is the agent of the formation of the rule? The Permanent Court of Arbitration makes no express

¹ See De Lapradelle-Politis, *Rec. des arbitrages internationaux*, Vol. I, Introduction.

² See, e.g., the decision of the Senate of Hamburg in the case of Yuille Shortridge & Co. (October 21, 1861), De Lapradelle-Politis, *op. cit.*, Vol. II, p. 78.

³ De Lapradelle-Politis, *op. cit.*, Vol. II, Introduction.

⁴ See the decision of October 11, 1912, in the Russo-Turkish case, pp. 77, 79, and 81.

reference to the existence, in the minds of the judges to whose decisions it refers, of a conviction that they are acting in accordance with positive law. On the other hand the Court sometimes refers to decisions given in equity, that is to say outside existing law—a fact which allows it to be said that the *opinio juris* is perhaps not an indispensable element in the creation of a customary rule by a judge. The reflection that every decision adds to the rule new details, the conformity of which with the positive existing law is not always very certain, makes it easier to accept this view.

If the existence of the conviction that the action taken is in conformity with existing law does not appear from the evolution of customary law by decisions, the practice of the Permanent Court of Arbitration makes us observe on the other hand another peculiarity of the way in which international law is worked out by decisions. The Court is not satisfied with observing that a rule is established in a certain number of earlier decisions, it goes farther and inquires whether the rule is equitable and corresponds with the necessities of international order.¹

It may apparently be said that if two different solutions are possible the Court would decide in favour of the view which would appear best adapted to the actual case.

The tendencies of the Permanent Court of Arbitration are met with again in the decisions of special tribunals. The same careful examination of international practice in combination with considerations of equity is to be found in the Venezuelan arbitration of 1903.² Post-war arbitrators are equally careful to make their decisions agree with the earlier practice.³ There is no doubt that the evolution of arbitration towards the constitution of a firm and definite set of rules on the essential points of international law is one of the essential conditions of the progress of the legal order. In the practice of arbitration we see this evolution take definite shape. The constitution of a really permanent international court ought to have had the effect of perfecting the development. Have the decisions of the Permanent Court of Justice been able to fulfil this task?

┌ In certain aspects, it is undeniable that the P.C.I.J. has

¹ See the decision referred to in the preceding note.

² See in particular the decisions of the American arbitrators—Plumley (*Schweyn's case*, Ralston-Doyle, *Venezuelan Arbitrations of 1903*, p. 393, decision on damages, *ibid.*, p. 413), Duffield (*Kummerow's case*, *ibid.*, p. 557), Ralston (*Sambiaggio's case*, *ibid.*, p. 681).

³ See, e.g., the decision in the case of *Salem* (June 8, 1932, decision by Walter Simons, *Revue de dr. intern.*, 1933, p. 760) and *Martini* (decision of M. Oesten Unden published at Upsala in 1930).

contributed powerfully to clearing up some doubtful points in international law. Thus it has been able to give some interpretations of the League Covenant which, though they have no obligatory force, have nevertheless influenced the policy of the Council.¹ It has also defined the notion of "control" (*contrôle*) on which the treaty of Versailles based the answer to be given to the question of the nationality of companies.² The nature of the international régime of the Free City of Danzig, established by Articles 100–8 of the Treaty of Versailles, was also made clear in detail thanks to the results of the opinions of the Court on this question.³

Further, the Court apparently desires to maintain the consistency of its decisions. Once it has taken any particular decision, the Court always seeks to adapt later judgments to it, referring, when necessary, to the reasons given for its earlier decision.⁴

But side by side with these tendencies, which certainly contribute to give international law a consistency and unity which it urgently needs, it seems to us that certain proceedings of the Court are likely to produce the contrary result. Unlike arbitral tribunals and the Permanent Court of Arbitration, the P.C.I.J. does not like citing authorities. It frequently proceeds by means of trenchant pronouncements and relies rather on general principles than on particular rules. This introduces an element of uncertainty, the dangers of which should not be overlooked. Thus the Permanent Court has been led on certain occasions to lay down a principle which soon afterwards it has had, if not to deny, at any rate to modify.⁵ And on other occasions, declarations by

¹ See, e.g., the interpretations of Article XV (8) of the Covenant in Advisory Opinion No. 4 of February 7, 1923, and of Article XVII in Advisory Opinion No. 5 of July 23, 1923.

² See Decision No. 7 of May 25, 1926, *Publ. of the P.C.I.J.*, Series A, No. 7, p. 68.

³ See in particular Opinion No. 15 (Jurisdiction of Danzig courts), *Publ. of the P.C.I.J.*, Series B, No. 15; Opinion of February 4, 1932 (Treatment of Polish Nationals in Danzig), *ibid.*, Series A/B, No. 44; Opinion of December 4, 1935 (Danzig Legislative Decrees), *ibid.*, Series A/B, No. 65. And see *supra*, p. 141, n. 1.

⁴ See, as to the principles of the international liability of the state, the reference in the Advisory Opinion of February 4, 1932, to Decision No. 7, *Publ. of the P.C.I.J.*, Series A/B, No. 44, p. 25. Decision No. 7 has generally had a powerful influence on the later decisions of the Court. See references to that decision in Decisions No. 8 (*ibid.*, Series A, No. 9, p. 30) and 13 (*ibid.*, Series A, No. 17, p. 46).

See also, in Decision No. 10 of October 10, 1927 (*Mavrommatis* case), the reference to earlier decisions (Decisions Nos. 2 and 5) given in the same case (*ibid.*, Series A, No. 11, p. 18).

⁵ In the *Chorzów* case (Decision No. 7, p. 29) the Court asserts that a treaty creates rights only between the states which are parties. But in Advisory Opinion No. 15 of March 3, 1928 (jurisdiction of Danzig courts), the Court is obliged to admit that treaties may concern directly even individuals.

the Court are actually in conflict with international positive law.¹ It is permissible to wonder whether, behind the so-called declarations of the principles of international law, a real modification of international law by the Court is not to be found. In itself such a fact would not matter much.¹ Between the customary development of law by cases, and the direct creation of rules of law by the judges, the distance is less than is usually supposed. Only the Court, imbued with the idea of sovereignty, has certainly a tendency to modify existing law in the direction of weakening legal international ties.² Perhaps it might be suggested to the highest international court that it should once more give greater weight to a more attentive inquiry into precedents, following the examples of the Permanent Court of Arbitration and of the English and American courts. With the possibilities, to which we have called attention, afforded by the character of the Court as a permanent institution it might certainly be led to make more complete use of the rich international customary material than has hitherto been the case in consequence of practices the justification for which we have ventured to dispute.

With case-law, we have concluded the examination of the customary development of international law by international organs. Are there other subjects of law whose acts constitute international custom? In other words, is it conceivable that customary international law can originate in the action of subjects of law other than those which are in direct contact with international law?

The school which bases custom on the consent of states naturally answers this question in the negative.³ But certain writers have recently undertaken to prove that the activity of purely domestic organs of the state may create customary international rules.⁴ What is the answer of practice in this controversy of theory?

¹ See in particular Decision No. 13 (*Publ. of P.C.I.J.*, Series A, No. 17, p. 47), where the Court says that the remedy for an international wrong may consist in a *restitutio in integrum*. But it is clear that general international law knows only compensation by equivalence (*réparation par équivalent*). See the author's article: "Du conflit entre le traité international et la loi interne", *Rev. dr. int. législ. compar.*, 1937, pp. 129 *et seq.*

² See, e.g., the remarks of the Court as to the liberty of states in the case of *The Lotus*, *Publ. of the P.C.I.J.*, Series A, No. 10, p. 18.

³ See K. Strupp, *op. cit.*, p. 334; D. Anzilotti, *op. cit.*, p. 75.

⁴ G. Scelle, *Précis*, Vol. II, p. 312, and *Essai sur les sources formelles du droit international*, p. 422; H. Lauterpacht, *op. cit.*, pp. 80 *et seq.*

III. *The Elaboration of International Custom by the Action of Internal State Organs*

It is an incontestable fact that, as a result of the insufficiency of international law, the internal organs of the state often have to display their activity in reference to one question or another of international law. Is the similarity of such action without importance in the formation of international rules? The example of the formation of international law in the sphere of the legal position of diplomatic agents seems to show the contrary. Even authors as classical as Fauchille base most of the answers which they give to this question either on the concurrence of the decisions of national courts, or on the identity of the provisions of national legislation.¹

Is it possible to generalize this conclusion and say that where we find agreement in the national conclusions reached by a large number of countries on a question of international interest, we have a case of an international rule worked out by a customary process? We cannot formulate a conclusion so much in conflict with established opinion without first trying to define the position which international case-law has taken up on this point.

The Permanent Court of International Justice has avoided making any formal pronouncement on this question.² Nevertheless, an examination of its practice shows us that the Court often has recourse to the internal practice of states with a view to establishing a rule of international law. It is in this practice that the Court finds the origin of the rule by which a crime committed on foreign territory may be considered as committed on the national territory, if the criminal effects, or an act which is an element in the constitution of the crime, take place on the national territory.³ The domestic origin of certain international rules accepted by the Court becomes all the more clear when the origin of international custom as to the condition of aliens is examined. ✓

The Permanent Court in its decision No. 7 recognized that the rules as to expropriation with adequate compensation in advance, as well as the rules on the treatment of aliens and the respect of vested rights, are parts of international common law.⁴ On this point there are a number of rules below which a state cannot go

¹ See Fauchille, *Traité de droit internat.*, Vol. I, Pt. 3, pars. 684 *et seq.*

² See Decision No. 9 (*Lotus case*), *Publ. of the P.C.I.J.*, Series A, No. 10, p. 28.

³ *Ibid.*, p. 23.

⁴ *Publ. of P.C.I.J.*, Series A, No. 7, p. 22.

with respect to the foreigners on its territory. What is the origin of these rules which form the minimum of rights which a state is obliged to allow to foreigners? In accordance with its usual practice the Court does not reveal their source. But it is not difficult to discover it. MM. Fauchille and Sibert have described it very well in the opinion which they gave on Lithuanian agrarian reform.¹ The rules as to the condition of foreigners have been formed in virtue of the similar provisions of national legislations by which there has been elaborated an international custom containing a minimum standard in relation to foreigners.

The Permanent Court of Arbitration, moreover, takes this line boldly.² In the case of the Norwegian claims the Court deduces the rule for the respect of the private property of foreigners from the uniform solution given to this question by the various systems of domestic law.²

It cannot, therefore, be denied in the face of such definite declarations by the most important international tribunals that concurrent acts of the internal organs of states are to be considered as contributing to the evolution of international custom, when these acts are connected with legal relationships of an international character. It is true that no *opinio juris* of the parties interested is discoverable. When the individual legislator lays down a rule relating to the condition of foreigners he certainly does not think that he is executing an international obligation. His action is influenced by considerations of expediency and especially by the idea that the minimum of rights allowed to the foreigner is indispensable to the security of international relations. But this ought not to surprise us. We have already seen that the formation and existence of a custom depend on its conformity with the social needs of a legal order. The custom results from acts of the same character by subjects of law. And these acts have that character because those who do them cannot do otherwise. The nature of the legal relationship to be regulated requires a certain definite attitude.

This allows us to assert that whenever the facts themselves impose a certain conduct on subjects of law we have a customary rule. Starting with this idea, it could be demonstrated that in relation to conflicts of laws there are certain fundamental principles universally accepted constituting on this head a real international custom. This is how the rule *locus regit actum* as well as

¹ *Rev. gén. dr. int. publ.*, 1925, pp. 5 *et seq.*, particularly p. 22.

² Decision of October 13, 1922, p. 143.

the rule which requires that real estate should be governed by the *lex rei sitae* should be regarded. Here again the requirements of good sense are so strong that they compel the authorities who are confined to domestic legislation, to adopt a definite set of regulations the repetition of which, being necessarily and naturally constant and uniform, leads to the evolution by custom of an international rule.

May we go farther and say that whenever a point is governed by a uniform rule in a large number of national legislations the principle which it embodies is equally valid in international law? We have given in another place the reasons why we believe that this solution cannot be accepted if the rules in their origin have had no connexion with international relations.¹ The explanations which we have already given require us to make the same answer.

When legislators adopt a definite set of rules relating to their own nationals they have in view only interests of a national character. Considerations of international expediency which play so large a part in the construction of customary rules by the internal organs of a state are completely absent in the situation which we are now considering. The acts of national legislators here have no connexion with the international order, they cannot produce any effect upon it.

If these internal organs are to be capable of producing a customary international rule by their action, the legal relationship, which is the object of regulation by the legislator or the courts of law, must have from the outset an element of externality, and moreover the nature of this legal relationship must require some particular mode of regulation. These two conditions are not present when the activity of the internal organs has to do with purely national relationships.

On the other hand these conditions are present when the international relations connect individuals belonging to different national organizations, even if the organs of the state take no part. This is why we are able in fact to find the existence of customary rules worked out by simple private individuals.

IV. *Individuals as Agents in the Formation of International Custom*

Professor Hamel, in the lectures which he gave at the Hague Academy on the subject of the international forms of bank credits, calls attention to the influence of the corporation of bankers in

¹ See the author's article on the general principles of law, *Rev. gén. dr. int. publ.*, 1936, p. 285.

the formation of a uniform international custom.¹ He shows how, in spite of the differences between national legislations and sometimes in the face of the opposition of the courts, bankers have obtained in international relations legal protection for certain forms of credit which have seemed to them specially adapted to the modern technique of international banking relationships.

It is clear that here there is no feeling for law. The parties concerned know perfectly well that what they do is not covered by law. Indeed they often go against positive law. What definitely give the customary rule which is created by the repetition of their acts the obligatory force of a legal rule, are considerations of expediency supported by the determination of a powerful corporation to put the thing through. M. Hamel is clearly right when he speaks in this connexion of the rebirth of a *jus mercatorum*. Further evidence for such a rebirth is to be found in the tendency of governments to unify commercial law by the technique of conventions. But while the difficulties to which this method of developing international law gives rise forbid the achievement of the necessary progress, the parties themselves will undertake the task of discovering, by their own activity, a solution satisfying the requirements of international trade.

The customary rule will be certain and efficacious in proportion to the urgency of the needs to be satisfied. And the material power possessed by those who build the rule will equally play a part, though in our view the importance of this latter factor should not be exaggerated. If the difference between the necessary solution and the actual legal solution is too great, the insufficiencies of the law in force will always end by bursting the dikes by which law seeks to restrain the normal evolution of human relationships. Looking at the matter in this light we might even claim that the theory of the autonomy of the will in the determination of the law applicable to international contracts—a theory which with certain variations almost all national courts accept—is nothing less than the possibility allowed to individuals of escaping the inconveniences of the existing system of law which leaves to each state, in its own domain and without regard to international realities, the task of settling questions of the conflict of laws. The theory of the autonomy of the will would thus be in the last analysis the result of a “revolt of the facts against the code”—a revolt realized by *the concurrent activity of the subjects of law, an activity determined by the requirements of social life.*

¹ J. Hamel, “Les formes internationales des crédits bancaires”, *Rec. des Cours de l'Acad. de la Haye*, Vol. LI, 1935, p. 205.

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This has always been our view of custom. The analysis of positive law allows us to conclude that all the subjects of law which are in close or even distant touch with international relations contribute to the formation of international custom. We have demonstrated that as a general rule the formation of custom does not depend on the presence in the minds of the parties of an *opinio juris*, but that on the contrary the content of the customary rule often plays the principal part. Sometimes it is merely the satisfactory and reasonable character of the custom which allows a decision whether a particular rule has or has not the character of a legal rule.

This is where the strength and the weakness of the formation by custom of international law lie: its strength, because this is why custom is more closely adapted to life than legislative rule and consequently offers a better prospect for a satisfactory regulation of human relationships; its weakness, because more often the extra-legal elements which fix the needs of any given society cannot easily be distinguished, whence comes an element of uncertainty as to the existence of a customary rule; we have even seen that this uncertainty subsists when the custom is formed by the judge.

A remedy might be found in the codification of custom. In view of what has been said above this would seem highly desirable. We are not afraid of the danger of stopping the evolution of custom or of making it lose contact with life. It is not very difficult to prove that the evolution of custom itself tends to a certain traditionalism which would not be in conflict with an attempt to define positive customary law.

We do not, however, believe that at the present time it is possible to realize codification. The check of the conference of 1930 gives us too clear a lesson on this point. States were there seen to refuse to accept formally rules the positive character of which could not be called in question.¹ The jurist may criticize the restrictive tendencies of states, but he must recognize the existence of these tendencies and take account of them in his conclusions. On our special subject, the present policy of states, when it destroys the possibility of correcting by the definition of customary rules the technical faults of this method of the formation of international law, certainly results in putting obstacles in the way of a satisfactory contribution to the organization of international society by the elaboration by custom of international law.

¹ See, e.g., C. Eustathiadès, *La Responsabilité internationale de l'État pour les actes des organes judiciaires*, Paris, 1936, Vol. II, p. 366.

OBITUARY NOTICES

ELIHU ROOT

THE death of Mr. Root on February 7 at the great age of 91 has removed one who occupied a prominent place in the world of international affairs.

It fell to Mr. Root's lot, first as Secretary of War in the United States and then as Secretary of State, to have to deal with many questions of international moment. The time when he filled these offices was a period of expansion in the United States. The Spanish-American War had placed Cuba under his country's control, and the Philippines and Puerto Rico under its sovereignty. Mr. Root as Secretary of War had to restore order and to organize a new administration in all these territories, taking account of the foreign interests that existed.

When Mr. Root became Secretary of State a different set of problems presented itself. Canada was expanding, speaking relatively, almost as rapidly as the United States. If cordial relations were to be preserved along the great unfortified frontier to the south of the Dominion it was essential that provision should be made for the adjustment of potential causes of friction. Fortunately Mr. Root found in Lord Bryce, who was then the British Ambassador at Washington, a sympathetic coadjutor.

As settlement of a country becomes closer and vested interests develop, a frontier which consists of no more than the arbitrary application of a parallel of latitude, and ignores all such natural features as rivers and lakes, is likely to give rise to innumerable boundary questions and to disputes as to the line between the limitrophe states. Nothing less than a permanent machinery to which such disputes can be referred as a matter of course without provoking political discussions can be effectual, if good-will and tranquillity are to be preserved. That the Secretary of State was able and willing to negotiate and conclude with His Majesty's Government on behalf of Canada the Boundary Waters Treaty of 1909, bringing into being the International Joint Commission, shows how true was Lord Bryce's estimate of Mr. Root when he said: "I have never known any one in either hemisphere with a wider range of vision or a mind more fair and just in its handling of diplomatic negotiations."

Mr. Root acted as Senior Counsel for the United States in the arbitration at The Hague in 1910 of the dispute as to the North

Atlantic Fisheries, the agreement for the arbitration being one which he had himself negotiated with Lord Bryce in 1909. The success of this arbitration in putting an end to a dispute which had lasted for a century and which had embittered the relations between the seafaring populations along the Atlantic seaboard is well known. A side of it which is less well known is that it constituted one of the greatest forensic duels of modern times: a duel between Lord Finlay, then Sir Robert Finlay, acting as counsel on behalf of Canada, and Mr. Root. Sir Robert Finlay's speech in opening the case lasted sixteen sessions; Mr. Root's closing speech on behalf of the United States lasted thirteen sessions.

The interest which Mr. Root took in the foundation of the Permanent Court of International Justice is common knowledge. It had been during the time when he was Secretary of State at Washington in 1907 that the Delegation from the United States at the Second Peace Conference at The Hague brought forward a scheme for setting up a permanent international tribunal under the name of the Court of Arbitral Justice, a scheme which would have come into effect if it had proved possible to find some acceptable mode of choosing a body of judges limited in number and yet representative of the whole world. The problem therefore as to how to choose the judges for an international tribunal of world-wide jurisdiction was no new one to Mr. Root when he agreed to serve on the committee appointed by the Council of the League to prepare the plan for the establishment of a Permanent Court of International Justice which the Council was called upon by Article 14 of the Covenant to formulate. The ingenious scheme which he and Lord Phillimore hit upon for reconciling the interests of the Great Powers and of the whole body of states by an adroit use in the election of the judges of the separate functions of the Council and of the Assembly enabled the difficulty, which had seemed insurmountable in 1907, to be overcome.

In 1910 Mr. Root became President of the Carnegie Endowment for International Peace, and in that way his name became a household word with all the organizations and publications which are connected with international law and are helped by the generous subventions provided by the Endowment.

In 1929 Mr. Root made a gallant effort to help forward the acceptance by his own country of membership of the Permanent Court of International Justice at The Hague. Though he was already well over 80 he went to Geneva to take part in the work

of the committee which had been appointed to consider the revision of the Statute of the Court adopted in 1921. The Council had delegated to this same body the duty of examining a communication from the Administration at Washington on the subject of the reserves which the United States had wished to make if they became a party to the Protocol giving force to the Court's Statute. The note from Washington expressed a desire for the exchange of views which it had been hoped would take place in 1926.

It was only in connexion with advisory opinions that difficulties were felt in the United States, the idea being that the Council might obtain an advisory opinion from the Court without the consent of the United States in a matter in which that country claimed an interest. Mr. Root saw that amendments to the Court's Statute in order to meet this point were not practicable, and suggested the adoption of machinery for deciding in each case whether the objection of the United States was, or was not, well founded, and for enabling it to withdraw its acceptance of the Protocol if no agreement could be arrived at. To give effect to Mr. Root's suggestion a formula was found, which he himself accepted and which was embodied in a Protocol signed in due course by practically all the Powers represented at the Assembly in 1929, and by the U.S.A. Ultimately, however, the Senate refused its consent and the Protocol has never come into force.

Mr. Root was too sound a statesman to have accepted any draft which was really prejudicial to his country's interests. The rejection of the Protocol by the Senate must therefore be taken as showing that public opinion in the United States was not yet ripe for such a measure of co-operation with a tribunal of general jurisdiction.

Whether in the long run the Court itself will suffer from the refusal of the United States to co-operate time alone will show. It is more than likely that it was a mistake on the part of the Members of the League to accept the idea of participation by one state on a different footing from that binding on others; more particularly when most of the states represented at Geneva would have hesitated to extend to other non-Member states the privilege of a similar arrangement.

That the Special Protocol for the United States should have been accepted in 1929 must have been in great part due to the prestige attaching to Mr. Root's personality, and to the assumption that what he recommended his country would accept.

By temperament Mr. Root was patient and far-seeing; in

manner he was gentle, modest, and courteous; he was a man of scholarly attainments and wide interests. Endowed with qualities so great, he deserved the universal admiration and esteem which were felt for him.

C.

WALTHER SCHÜCKING

THE life of the German judge in the Permanent Court of International Justice, who passed away on August 25, 1935, at the age of sixty, was a life of struggle and suffering. Pre-war Germany understood but little of the eloquent and fascinating professor in the Marburg University, who by his lectures and writings proved how well he realized what benefit for international organization might grow out of the Hague Peace Conferences. This lack of understanding even took the form of something very like persecution. But all this had only the effect of strengthening Schücking's courageous conviction, which took shape in (amongst other writings) his classic first volume of the series *Das Werk vom Haag* (1912).

In 1930 Schücking was elected by the Assembly and the Council of the League of Nations, of both of which Germany was then still a member, judge in the Permanent Court of International Justice. In every respect he there proved to be the right man in the right place.

Schücking had a thorough knowledge of international as well as national law, which has so often to be applied by international jurisdictions. In forming his opinion he used to show great deliberation and prudence; often he professed with a smile that he understood just enough of the case to know that he had not yet fully grasped it! Justice, equity, and complete impartiality had as much weight with him as legal knowledge. He had that rare mental courage which allowed a frank avowal of a change of mind, once he was convinced of the soundness of a view differing from that which he had at first adopted.

Belonging to an old family that for many centuries had been thoroughly associated with the cultural life of his Westphalian country, Schücking clung with his whole heart to Germany. All his life he was a convinced pacifist in the literal sense of the word—"a maker, an organizer of peace", as Schücking a few months before his death once more pointed out in his beautiful essay in the *Friedenswarte* "Was heisst Pazifismus?" (What does Pacifism

mean?). In politics he was a Liberal through and through. But no one of Schücking's colleagues in the Permanent Court of International Justice was ever able to discover in his individual notes or dissenting opinions either the German or the Pacifist or the Liberal. This perhaps is the best tribute one can pay to Schücking's excellence as a judge.

International legal science has lost in Schücking one of its best representatives, international jurisdiction one of its best judges, the League of Nations and international organization in general one of its most convinced supporters, Germany one of her most loyal sons.

VAN EYSINGA

BARON ÉDOUARD ROLIN JAEQUEMYS

IN July 1936 the Permanent Court of International Justice was, by the death of its Belgian member, placed in mourning for the third time since the election of the present judges in 1930.

Baron Édouard Rolin Jaequemys was one who, so to speak, was "born in the purple" among international lawyers. His father had been one of the founders of the Institute of International Law, and the son could remember being taken as a child of ten to one of the meetings at the Hôtel de Ville at Ghent in 1873, when the Institute was established.

Before the war Rolin Jaequemys had a considerable business as a lawyer in private practice, and the experience that he then gained of men and things, acting on behalf of companies with connexions in foreign parts, stood him in good stead in later years. Much of his time, however, was devoted to international law. In 1892 he became the editor of the *Revue de droit international et de législation comparée*, which had been founded by his father, and by Asser and Westlake. He also took a prominent part at many of the meetings of the Institute of International Law, of which he had been elected an associate in 1891 and a member in 1896. In 1899 he took part in the First Peace Conference of The Hague, as a delegate of the Kingdom of Siam, and was charged with the duty of acting as reporter for the Fourth Convention (on the Laws and Customs of War).

During the war he was in Belgium, doing what he could to help his compatriots in the difficult period of the German occupation.

When the war was over he was a member of the Belgian

delegation to the Peace Conference at Paris, and presently became Secretary-General of the delegation. When that work was finished he was appointed to be Belgian High Commissioner in the Occupied Territory of the Rhineland. As such, he had a task that called for the exercise of all his gifts. The administration of the territory was entrusted to a composite body which could only function with success if its members pulled together. Unfortunately, good government did not always coincide with the political aspirations of the particular governments which the individual High Commissioners represented, and to get them to pull together was no easy matter.

It was during his tenure of office as High Commissioner in the Rhineland that the Baron was the victim of a street accident in which his leg was injured, an accident which in later years caused him frequent suffering, though it never sapped his courage or his cordiality.

Twice the Baron was elected to the presidency of the Institute of International Law. In 1923 he presided over the session which was held at Brussels to commemorate the fiftieth anniversary of the foundation of the Institute, and again in 1936 when it was found to be impossible to hold the session in Madrid, as planned, and at the last moment the meeting was transferred to Brussels.

In 1925 the Baron entered for a time the public life of his country, being in that year appointed Minister of the Interior. Five years later he was elected to be a judge of the Permanent Court of International Justice. To his work in the Court the Baron devoted himself with great fervour; he was regular and punctual in his attendance at all the meetings; in his dealings with his colleagues he never failed to exhibit a charming and old-fashioned courtesy that often helped to avoid the asperities which might otherwise have attended the forceful upholding of divergent points of view.

Two qualities in particular stand out in the memory of those who served with him: his courage and his sociability—sociability as shown by the pleasure that he took in the social life of The Hague; courage not only in holding to an opinion he had arrived at on a point coming before the Court for decision, but courage in facing the duties and burdens of his post, despite the increasing physical disabilities from which he suffered during the concluding years of his judgeship.

DR. MENDELSSOHN-BARTHOLDY

THE death of Dr. Mendelssohn-Bartholdy in Oxford last December will be felt by all international lawyers as a loss to legal science, by all friends of international peace and understanding as a loss to the causes they have at heart, and by the wide circle of those who were fortunate enough to know him personally as the loss of a highly sympathetic and attractive character.

His interests in legal matters ranged principally over all provinces of international law, public and private, and indeed over the whole field of international relations. Before the War he was Professor of Civil Law and the Law of Procedure at Würzburg; after the War until 1933 he was Professor of International Law at Hamburg, where he founded and directed the Hamburg Institute of International Affairs, and was specially active for the improvement of the relations of post-War Germany with America. He served as the member appointed by the German Government on the Arbitration Tribunal at The Hague for the settlement of disputes on the interpretation of the Dawes and Young Plans for the arrangement of German Reparations. And amongst other activities he was one of two editors responsible for the publication of the German official documents on Foreign Policy from 1871 to 1914 (*Die auswärtige Politik des Deutschen Reiches 1871-1914*).

As to his contributions to private international law, readers of the *British Year Book* will not have forgotten the article "The Delimitation of Right and Remedy in the Cases of Conflict of Laws" which he contributed in 1935; shortly before his death he had prepared the monograph on the doctrine of "Renvoi", which has since been edited by Dr. Cheshire.

He came to Oxford in 1934 and was elected Senior Research Fellow at Balliol.

A grandson of the composer and himself highly gifted as a musician, he devoted his life to the spread in human relations of that harmony which was one of his country's greatest contributions to civilization and of which the world at present is so much in need.

NOTES

LEAGUE OF NATIONS

AMENDMENT OF THE COVENANT

THE past history of amendments and proposals of amendments to the Covenant does not encourage the hope or expectation that any change of importance in the text is likely to be adopted in the near future.

Two tendencies are in conflict: one, to strengthen the powers of the League generally, possibly by amending Article 11 so as to allow action under it to be taken without the assent of a state party to a dispute, possibly by amending Article 16 and perhaps Article 10 by a more precise definition of the circumstances in which "sanctions" are to be taken, and by making military as well as economic sanctions compulsory in certain events; the other, to make the Covenant correspond to what supporters of this tendency hold to be the ineluctable facts of the situation and recognize that compulsion even to economic sanctions is, in existing conditions, impracticable. It seems likely that neither tendency will command the unanimity in the Council and the majority in the Assembly which are required by Article 26 of the Covenant for the amendment of its provisions.

It should be noted that the proposals to "strengthen" Article 11 involve a point of interpretation which, if such proposals were accepted, would become of great importance—viz. Does Article 11 imply a power to the Council to issue orders to members of the League (e.g. orders to take military action, or to take part in a blockade, or, so far as regards their own commerce, to acquiesce in a blockade), or are its powers under that article simply advisory? So long as it was held that the unanimity rule governed Article 11 and that therefore action under the article, whether its nature was that of advice or of command, required the assent of the state to which it was addressed, whether that state was or was not itself a member of the Council, the question was purely academic, but, if that assent is not to be required, the Council, on one interpretation of the article, will acquire a new and a very formidable authority. It is to be hoped that in the discussion of any amendment to Article 11 it will be insisted that clarity on this point is essential. The terms of the amendment itself should be drawn in such a way as to exclude any doubt as to its intention.

THE POWER OF THE LEAGUE TO MODIFY THE COMPOSITION OF THE ADVISORY AND TECHNICAL COMMITTEE FOR COMMUNICATIONS AND TRANSIT

Some interesting points have arisen in connexion with the revision of the composition and functions of certain committees of the League of Nations which has recently been taking place. The Special Committee appointed by the Council of the League to make recommendations on this subject had proposed that the Advisory and Technical Committee for Communications and Transit should cease to consist of persons appointed by governments as experts,¹ and should become a committee of government representatives. The Council endorsed this proposal and added that provision should be made to enlarge the Advisory Com-

¹ For the method of appointment hitherto, see the Statute of the Organization for Communications and Transit, Article 13, which is printed in Hudson, *International Legislation*, Vol. III, pp. 2111-13.

mittee so as to include all governments wishing to be represented. The Advisory and Technical Committee for Communications and Transit was then asked to make detailed proposals for the application of these changes, and its Chairman appointed a Special Committee to formulate such proposals. This Committee, however, became convinced that there were strong objections to the changes proposed and reported to this effect.¹

The objection which the Special Committee regarded as decisive was based on the functions of the Advisory and Technical Committee in respect of disputes between states. Certain of these functions were entrusted to the Advisory and Technical Committee by an Assembly resolution of December 9, 1920,² but others result from the international conventions concluded under the auspices of the Transit Organization and from the Statutes annexed thereto.³ Under these instruments the Advisory and Technical Committee may be called upon to give advisory opinions in disputes between states, in the case of the Statutes under procedures of conciliation preliminary to a possible recourse to the Permanent Court, in the other cases under Articles which do not provide for any such recourse. Under the Statutes the Committee may also, in urgent cases, recommend by a preliminary opinion temporary measures intended to restore the facilities which existed before the act or occurrence which gave rise to the dispute. In view of these provisions the Special Committee appointed by the Chairman of the Advisory and Technical Committee for Communications and Transit reported in the following terms:

The Special Committee considered that it was not legally possible in any case relating to the settlement of disputes to make an extensive change in the nature of the advisory and technical organ of the League of Nations to which the contracting parties have undertaken in advance to submit certain disputes. This would, however, be the case if the disputes were henceforward referred to an extremely numerous body of uncertain composition, which would make it unsuitable in fact and in law for the accomplishment of a quasi-judicial task.

It is, indeed, an established rule that the composition of jurisdictional authorities or quasi-judicial organs must be fixed in advance, and that the composition may not constantly change, as would be the case if the Advisory and Technical Committee were composed of representatives of all states wishing to be represented.

In addition, a further substantial change would be caused by the modification of the character of the Advisory and Technical Committee, which would cease to be a meeting of experts and would become a conference of governmental delegates—that is to say, an organ quite different from that to which the common intention of the contracting parties entrusted the settlement of certain disputes between states.

The Committee considers that the preliminary conciliation accepted by the states taking part in the principal international transit Conventions—who are obliged to submit their disputes to an organ which the Barcelona Conference and the initial resolutions of the Assembly constituted as a stable organ of experts—is opposed to any change in the nature of that organ; indeed, it is to be feared that the states bound by the Conventions would no longer recognize the competence of an organ which had undergone essential change and would refuse to submit their disputes to a numerous and fluctuating assembly of governmental delegates.

¹ For its report see *League of Nations, Official Journal*, 17th Year, No. 6, June 1936, pp. 732–8.

² *League of Nations, Records of the First Assembly, Plenary Meetings*, p. 346.

³ The texts of the relevant Articles are reprinted in the Report of the Special Committee in *League of Nations, Official Journal*, 17th Year, No. 6, June 1936, pp. 736–8.

On receipt of this report the Council decided to abandon the projected reform in the form in which it was originally proposed.¹ The subsequent history of the matter is of no importance in connexion with the examination of the legal doctrine formulated by the Special Committee which is the object of this note.

The Special Committee presumably did not mean to suggest that, in cases where jurisdictional functions are entrusted by international Convention to a body established by some other Convention or by a resolution of some other body, *any* change in the composition of the body to which those functions are entrusted, even though made in accordance with statutes of which the parties entrusting the functions were cognizant, would raise a question as to whether the body to which such functions had been entrusted was still entitled to exercise them. In several passages, indeed, the Special Committee expressly safeguarded itself against so wide an interpretation of its meaning. It considered that it was not legally possible to make an "extensive change" in the organ given jurisdictional functions; that the transformation of the Advisory and Technical Committee from a meeting of experts into a conference of governmental delegates would be a "further substantial change" and would make it "an organ quite different from that to which the common intention of the contracting parties entrusted the settlement of certain disputes between states"; that the fact that states had undertaken to submit their disputes to an organ constituted as a stable organization of experts made impossible any change "in the nature of that organ"; and that states might no longer recognize the competence of an organ which had undergone "essential change". All these expressions emphasize that it is by no means every change in the composition of an organ given jurisdictional functions under independent instruments that will be open to legal objection. Apparently the Special Committee would see no legal objection to any change in the composition of the Advisory and Technical Committee which left unaffected its essential character.

The student of international institutions will note with satisfaction the view of the Special Committee that a jurisdiction which has been conferred upon a distinctively international body cannot, by a change in the nature of that body, be transferred to a conference of governmental delegates; but he will be well advised to ponder as to whether states which have conferred a certain jurisdiction upon a body the composition of which may, under its own statutes, be modified from time to time, have not, subject to the possibility that a change in the very nature of the body concerned constitutes an exceptional case, conferred that jurisdiction upon that body as constituted by its statutes for the time being in force. The principle involved here, that the powers conferred upon international bodies are not modified by any change in the composition or organization of those bodies effected in a regular manner, is of far-reaching importance for the future of international organization. The ground that has been won by the inclusion in the constituent instruments of various international bodies of provision for their modification by less than unanimous consent may well be lost if the doctrine gains ground that such modification can, in relation to a state not approving it, invalidate powers vested in the body concerned by another instrument.

From a more strictly legal standpoint a difficult problem obviously arises as to what constitutes a change "in the nature of" an organ, or an "essential change". Possible analogies from the law of frustration of contract may be of some service in this connexion. The test would seem to be, in the language of the Special

¹ *League of Nations, 93rd Session of the Council, Minutes, 4th Meeting*, pp. 2-3 and 5.

Committee, whether the change proposed would make the body concerned "an organ quite different from that to which the common intention of the contracting parties entrusted the settlement of certain disputes between states". What would be the effect of the adoption of such changes? The Special Committee seems to suggest that it is legally impossible to make such changes, but this would seem to overstate the case. Surely if such a change were made by the proper procedure the validity of the action which had been taken would not be open to question, and the body the composition of which had been changed would be validly constituted in its new form. At the most, it is submitted, the obligations of states to refer certain matters to that body might be avoided by the supervening change in its nature. However this may be, the whole question of the extent to which new functions and obligations can be imposed upon international bodies by instruments other than those under which they are constituted, and of the effect of such subsidiary instruments, is one of crucial importance for the development of international institutions and has hardly received the attention which it deserves.

C. W. JENKS.

THE PERMANENT COURT OF INTERNATIONAL JUSTICE

THE year 1936 has seen considerable changes in the constitution, and also in the composition, of the Permanent Court of International Justice.

On February 1 the Revised Statute of the Court was brought into force in accordance with a resolution passed by the Assembly of the League of Nations. This resolution requested the Council to take the steps necessary to bring into force on February 1 the Protocol signed in 1929 for giving effect to the amendments introduced in that year into the original text of the Statute.

The amendments now brought into effect by the Revised Statute introduce no fundamental modifications of the Court's charter. Outwardly the most important changes are the disappearance of the deputy-judges (none of whom had been called on to sit since the number of judges was raised to fifteen in 1930) and the addition of some articles regulating the exercise of the Court's power to give advisory opinions. These articles, however, already figured to a large extent in the Rules of Court and were merely transferred to the Statute so as to take it out of the power of the Court to alter them. The remainder of the changes were mainly points of detail or of practice.

When the Revised Statute came into force, the Court completed the revision of its Rules of Court on which it had been engaged for some time. The new Rules were brought into force on March 11.

The vacancies in the Court due to the death of Dr. Schücking, and the resignations of Mr. Kellogg and Mr. Wang-Chung-Hui were filled during the meeting of the Assembly of the League in the autumn of 1936 by the election to judgeships of Dr. Manley Hudson (U.S.A.), Mr. Ake Hammarskjöld (Sweden), and Dr. Cheng Tien-Hsi (China). The fourth vacancy, created by the death of Baron Rolin Jaequemyns in July 1936, could not be filled at the time of the above elections, as the procedure in connexion with the nomination of candidates by the various national groups in the Permanent Court of Arbitration established by the Conventions of 1899 and 1907 takes so long that it was impossible to proceed to the election in September.

The election of Mr. Hammarskjöld to a judgeship created a vacancy in the

post of Registrar. On December 5 the Court elected Mr. Lopez Olivan to be Registrar. Mr. Lopez Olivan was at one time Deputy Registrar of the Court, and subsequently Spanish Minister at Berne, and then for a short time Spanish Ambassador in London.

At the close of the year Sir Cecil Hurst's term of office as President expired. On November 25 the Court elected Dr. Guerrero, the Vice-President, to be President for the next three years. Sir Cecil Hurst was elected Vice-President.

INTERNATIONAL LABOUR OFFICE

THE APPLICATION OF CERTAIN INTERNATIONAL LABOUR CONVENTIONS IN THE FRENCH POSSESSIONS IN INDIA

ARTICLE 23 of the Constitution of the International Labour Organization (Article 409 of the Treaty of Versailles) provides that:

"In the event of any representation being made to the International Labour Office by an industrial association of employers or of workers that any of the Members has failed to secure in any respect the effective observance within its jurisdiction of any convention to which it is a party, the Governing Body may communicate this representation to the Government against which it is made, and may invite that Government to make such statement on the subject as it may think fit."

The International Labour Office has recently published¹ the first report which the Governing Body has seen fit to publish, upon a representation under this Article. The main issue involved in this representation was the extent of the obligation of Members of the Organization to apply conventions which they have ratified, in colonial territories. The source of this obligation is Article 35 of the Constitution of the Organization (Article 421 of the Treaty of Versailles) which is as follows:

"1. The Members engage to apply conventions which they have ratified in accordance with the provisions of this Part of the present Treaty to their colonies, protectorates and possessions which are not fully self-governing:

- (1) Except where owing to the local conditions the convention is inapplicable, or
- (2) Subject to such modifications as may be necessary to adapt the convention to local conditions.

"2. And each of the Members shall notify to the International Labour Office the action taken in respect of each of its colonies, protectorates and possessions which are not fully self-governing."

The representation in question was made by the Madras and Southern Mahratta Railway Employees' Union, and it alleged that there was nothing in the local conditions in French India to prevent the application there of certain conventions ratified by France. As evidence of this, reference was made to the fact that certain conventions had been ratified by India and were applied there. The Governing Body, acting in accordance with its Standing Orders concerning the Procedure for the Discussion of Representations, referred the representation to a committee which, after hearing a statement from the French Government representative on the Governing Body, reported that the representation fulfilled all the conditions of formal receivability defined by the Standing Orders but was not well founded in point of substance. The French Government had fulfilled the obligations

¹ *Official Bulletin*, Vol. XXI, No. 1, pp. 16-19.

imposed by Article 35 of the Constitution of the Organization, and the Committee had "no reason to suppose that the French Government had not carried out its examination of local conditions in complete good faith".

Despite this rejection of the representation, the report in the Madras and Southern Mahratta Railway Employees' Union case, the conclusions of which were approved by the Governing Body, is of considerable importance, for three reasons:

1. The terms of the report clearly imply that a Member of the Organization may, by the terms of a convention or of its own ratification of a convention, assume wider obligations to apply that convention in colonial territories than those which are incumbent on all Members of the Organization in virtue of the provisions of Article 35 of the Constitution. It follows that the Constitution prescribes a minimum of obligations which may be enlarged by the terms of particular conventions.¹
2. The report enunciates the doctrine that, while "each state is competent to decide as to the necessity and desirability of having recourse to" the reservations upon its obligation to apply conventions in colonial territories set forth in Article 35 of the Constitution of the Organization, the competence thus left to individual states cannot "be exercised in an arbitrary manner" since "the action taken must obviously be preceded by an examination in good faith of the local conditions and of the possibility of introducing into the Conventions such modifications as may be necessary to adapt them to such conditions".
3. The report formulates, though in guarded language, the proposition that the obligations resulting from Article 35 are not of such a nature that they can be regarded as having been performed until the end of time if at the date of ratification a Convention was inapplicable to a colony. Thus the Committee observes that "it would seem scarcely consistent with the engagement entered into under paragraph 1 of Article 35 that the action taken under paragraph 2 should be considered as final, no matter what circumstances might intervene".

The suggestions made in the report have since been endorsed² by the Committee of Experts on the Application of Conventions³ and have met with qualified approval⁴ from the Conference Committee on the Application of Conventions. The Conference Committee, while refraining from expressing any legal doubts as to the validity of the interpretation of Article 35 adopted in the report, stated that for its part it preferred to appeal to the good-will of governments rather than to lay stress on legal obligations. The Governing Body has also taken further action upon the report and has included among the particulars which governments are required, in virtue of Article 22 of the Constitution of the Organization, to include in their annual reports upon the application of Conventions, the question whether there has been a recent re-examination, in the light of any

¹ For the comparable position in the case of the Covenant see the Advisory Opinion of the Permanent Court of International Justice in the Case concerning the Frontier between Iraq and Turkey, *P.C.I.J.*, Series B, No. 12, p. 27.

² International Labour Conference, Twentieth Session, Geneva, 1936, *Report of the Committee of Experts on the Application of Conventions*, p. 4.

³ For which see this *Year Book*, Vol. XIV, 1933, pp. 143-5.

⁴ International Labour Conference, Twentieth Session, Geneva, 1936, *Record of Proceedings*, pp. 566-7.

changes which may have taken place in local conditions, of the possibility of applying or extending the application of Conventions in territories in which their provisions have been considered inapplicable or applicable only subject to modifications.

C. W. JENKS.

THE RECRUITING OF INDIGENOUS WORKERS CONVENTION, 1936

THE adoption on June 20, 1936, at the Twentieth Session of the International Labour Conference by 123 votes to 0 of the Recruiting of Indigenous Workers Convention, 1936, is a further step in the process of making a matter of international obligation the observance of internationally approved standards of indigenous labour policy. This Convention continues the work begun with the International Slavery Convention, 1926, which is now in force between 43 parties, and the Forced Labour Convention, 1930, which has been ratified by 17 Members of the International Labour Organization, including Great Britain, Australia, the Netherlands, Italy, Japan, and Spain. Measures for the ratification of the Forced Labour Convention have now been submitted to the parliaments of France and Belgium, and when ratified by these states the Convention will apply in almost all colonies and mandated territories.

Some of the more important articles of the Recruiting of Indigenous Workers Convention define general standards of policy in the application of which a wide discretion is necessarily left to governments. Thus Article 4 provides that:

“Before approving for any area any scheme of economic development which is likely to involve the recruiting of labour, the competent authority shall take such measures as may be practicable and necessary:

- (a) to avoid the risk of pressure being brought to bear on the populations concerned by or on behalf of the employers in order to obtain the labour required;
- (b) to ensure that, as far as possible, the political and social organization of the populations concerned and their powers of adjustment to the changed economic conditions will not be endangered by the demand for labour; and
- (c) to deal with any other possible untoward effects of such development on the populations concerned.”

So also Article 5 (1) provides that:

“1. Before granting permission to recruit labour in any area, the competent authority shall take into consideration the possible effects of the withdrawal of adult males on the social life of the population concerned, and in particular shall consider:

- (a) the density of the population, its tendency to increase or decrease, and the possible effect upon the birth-rate of the withdrawal of adult males;
- (b) the possible effects of the withdrawal of adult males on the health, welfare and development of the population concerned, particularly in connexion with the food-supply;
- (c) the dangers to the family and morality arising from the withdrawal of adult males;
- (d) the possible effects of the withdrawal of adult males on the social organization of the population concerned.”

Slightly more specific is Article 5 (2), which provides that

“where the circumstances make the adoption of such a policy practicable and necessary, the competent authority shall, in order to safeguard the populations concerned against any untoward consequences of the withdrawal of adult males, fix the maximum number

of adult males who may be recruited in any given social unit in such manner that the number of adult males remaining in the said unit does not fall below a prescribed percentage of the normal proportion of adult males to women and children."

Further general objectives of policy placed on record in the Convention are that recruited workers should be encouraged to be accompanied by their families and that it should in certain circumstances be a condition of permitting recruiting that the recruited workers shall be grouped at the place of employment under suitable ethnical conditions.

The convention also embodies more definite restrictions on recruiting. In principle non-adult persons are not to be recruited, but "the competent authority may permit non-adults above a prescribed age to be recruited with the consent of their parents for employment upon light work subject to prescribed safeguards for their welfare". Public officers are not to recruit for private undertakings "except when the recruited workers are to be employed on works of public utility for the execution of which private undertakings are acting as contractors for a public authority". Chiefs and other indigenous authorities are not to (a) act as recruiting agents; (b) exercise pressure upon possible recruits; or (c) receive from any source whatsoever any special remuneration or other special inducement for assistance in recruiting. No person or association is to engage in professional recruiting unless the said person or association has been licensed by the competent authority and is recruiting workers for a public department or for one or more specific employers or organizations of employers. Employers, employers' agents, organizations of employers, organizations subsidized by employers, and the agents of organizations of employers and organizations subsidized by employers are only to engage in recruiting if licensed by the competent authority. Rules relating to the issue and validity of licences and the obligations of licensees are set forth in some detail.

Another group of articles forms a code for the protection of recruited workers. Recruited workers are required to be brought before a public officer who is to "satisfy himself that the law and regulations concerning recruiting have been observed and, in particular, that the workers have not been subjected to illegal pressure or recruited by misrepresentation or mistake". Recruited workers are to be medically examined and provision is to be made for their acclimatization and adaptation, for their immunization against disease, and for their welfare during journeys to the place of employment. The expense of such journeys is placed on the recruiter or employer, and recruited workers are to be entitled to repatriation at the expense of the recruiter or employer in certain events. The competent authority is to limit the amount which may be paid to recruited workers in respect of advances of wages and to regulate the conditions under which such advances may be made.

Article 24, which deals with the recruiting of workers in one territory for employment in a territory under a different administration, is of special interest from an international point of view. Before permitting such recruiting the competent authority of the territory of recruiting is to satisfy itself that "all necessary measures have been taken for the protection of the recruited workers in accordance with the provisions of this Convention when the workers have travelled beyond its jurisdiction". Where the circumstances and extent of such recruiting appear to the competent authorities concerned to necessitate such action, the said authorities are to enter into agreements "defining the extent to which such recruiting is to be permitted and providing for co-operation between

them in supervising the execution of the conditions of recruiting and employment". International recruiting is to be permitted only under licence and "where the circumstances and the amount of recruiting for employment in a territory under a different administration appear to the competent authority of the territory of recruiting to necessitate such action": the said authority is to provide that such recruiting may only be undertaken by organizations approved by it. It is unfortunate that it was not possible, in this first general Convention upon the recruiting of indigenous workers, to attempt any more complete regulation of international recruiting. A proposal that such recruiting should only be authorized under conditions defined by agreements between the administrations of the territories concerned did not meet with acceptance.

Article 25 requires colonial states to append to their ratifications declarations stating the extent to which they undertake to apply the provisions of the Convention to their various territories. The text of the Convention has been published in the *Official Bulletin of the International Labour Office*, Vol. XXI, No. 3, at pp. 111-21.

C. W. JENKS.

THE 1936 MARITIME SESSIONS OF THE INTERNATIONAL LABOUR CONFERENCE

A BRIEF summary of the main provisions of the six draft conventions adopted by the International Labour Conference at its Twenty-First and Twenty-Second Sessions, both of which were held at Geneva in October 1936, may be of interest. Sufficient time has not yet elapsed for any ratifications of these conventions to be received, but if widely ratified¹ they will mark a notable development in international maritime social legislation.

The Officers' Competency Certificates Convention, 1936

The substance of this Convention is contained in the provision that

"no person shall be engaged to perform or shall perform on board any vessel to which this Convention applies the duties of master or skipper, navigating officer in charge of a watch, chief engineer, or engineer officer in charge of a watch, unless he holds a certificate of competency to perform such duties, issued or approved by the public authority of the territory where the vessel is registered."

Exceptions may be made only in cases of *force majeure*. No person is to be granted a certificate of competency unless he has reached a prescribed age, has had professional experience of a prescribed duration, and has passed examinations organized and supervised by the competent authority. National laws and regulations are to prescribe a minimum age to have been attained by and a minimum period of professional experience to have been completed by candidates for each grade of competency certificate and are to provide for the organization and supervision of examinations for certificates. There are transitional provisions and provisions relating to the enforcement of the Convention and to penalties or disciplinary measures for cases in which the provisions of the Convention are not respected. The Convention was adopted by the International Labour Conference by 80 votes to 9. The votes cast against were those of the United Kingdom, Indian, and Japanese government and employers' delegates.

¹ The eight conventions upon maritime questions adopted at earlier sessions of the Conference are all in force and have been ratified by 32, 25, 24, 32, 31, 21, 19, and 19 states respectively.

The Holidays with Pay (Sea) Convention, 1936

This Convention applies to

“the master, officers and members of the crew, including wireless operators in the service of a wireless telegraphy company, of all sea-going vessels, whether publicly or privately owned, which are registered in a territory for which the Convention is in force and are engaged in the transport of cargo or passengers for the purpose of trade.”

There are various exceptions. Every person to whom the Convention applies is to be entitled after one year of continuous service with the same undertaking to an annual holiday with pay of a duration of (a) in the case of masters, officers, and wireless operators, not less than twelve working days, and (b) in the case of other members of the crew, not less than nine working days. For the purpose of calculating when a holiday is due (a) service off articles is to be included in the reckoning of continuous service, (b) short interruptions of service not due to the act or fault of the employee and not exceeding a total of six weeks are not to be deemed to break the continuity of the periods of service which precede and follow them, and (c) continuity of service is not to be deemed to be interrupted by any change in the management or ownership of the vessel in which the person concerned has served. Public and customary holidays, interruptions of service due to sickness, and any time off allowed in compensation for weekly rest days and public holidays worked at sea, are not to be included in the annual holiday with pay. There is provision whereby in special circumstances holidays may be divided into parts, accumulated with subsequent holidays, or commuted for cash. In principle the holiday is to be given in the territory in which the vessel is registered, but by mutual consent the holiday may be given elsewhere. Every person taking a holiday in virtue of the Convention is to receive in respect of the full period of the holiday his usual remuneration which is to include a suitable subsistence allowance and is to be calculated in a manner prescribed by national laws or regulations or fixed by collective agreement. Any agreement to relinquish the right to an annual holiday with pay, or to forgo such a holiday, is to be void. The Convention is a complement to the Holidays with Pay Convention 1936, which applies to industry and commerce and was adopted at the Twentieth Session of the International Labour Conference in June 1936 by 99 votes to 15. The Holidays with Pay (Sea) Convention was adopted at the Twenty-First Session of the Conference by 60 votes to 15. The United Kingdom government delegates abstained, the United Kingdom employers' delegates voted against, and the United Kingdom workers' delegates voted for its adoption.

The Shipowners' Liability (Sick and Injured Seamen) Convention, 1936

This Convention applies to all persons employed on board any vessel, other than a ship of war, registered in a territory for which the Convention is in force and ordinarily engaged in maritime navigation, but Members may make exceptions in respect of certain stated classes of persons. The shipowner is to be liable in respect of (a) sickness and injury occurring between the date specified in the articles of agreement for reporting for duty and the termination of the engagement, and (b) death resulting from such sickness or injury. National laws or regulations may make exceptions in respect of (a) injury incurred otherwise than in the service of the ship, (b) injury or sickness due to the wilful act, default, or misbehaviour of the sick, injured, or deceased person, and (c) sickness or infirmity

intentionally concealed when the engagement is entered into. The shipowner may be liable, to an extent defined in provisions of a complicated character, under four heads: (a) the expense of medical care and maintenance; (b) wages; (c) repatriation expenses; and (d) burial expenses. He may be exempted from liability in respect of medical care and maintenance, repatriation expenses, and burial expenses in so far as such liability is assumed by the public authorities. The Convention and national laws or regulations relating to benefits under the Convention are to be so interpreted and enforced as to ensure equality of treatment to all seamen irrespective of nationality, domicile, or race. This Convention was adopted by the International Labour Conference by 70 votes to 14. The United Kingdom government and employers' delegates voted against adoption and the United Kingdom workers' delegates for adoption.

Sickness Insurance (Sea) Convention, 1936

This Convention requires that

“every person employed as master or member of the crew or otherwise in the service of the ship, on board any vessel, other than a ship of war, registered in a territory for which this Convention is in force and engaged in maritime navigation or sea-fishing, shall be insured under a compulsory sickness insurance scheme”,

but Members may make exceptions in respect of certain stated classes of persons. An insured person who is rendered incapable of work and deprived of his wages by reason of sickness is to be entitled to a cash benefit for at least the first twenty-six weeks or one hundred and eighty days of incapacity, from and including the first day for which benefit is payable.

“The right to benefit may be made conditional upon the completion of a qualifying period and of a waiting period of a few days to be counted from the beginning of the incapacity.”

The cash benefit granted to the insured person is never to be fixed at a rate lower than that fixed by the general scheme of compulsory sickness insurance where such a scheme exists but does not apply to seamen. The circumstances in which cash benefit may be withheld, reduced, or refused are defined. It should be noted that cash benefit may be withheld while the insured person is on board or abroad. The insured person is to be “entitled free of charge, as from the commencement of his illness, and at least until the period prescribed for the grant of sickness benefits expires, to medical treatment by a fully qualified medical practitioner and the supply of proper and sufficient medicines and appliances”, but in virtue of a proviso “may be required to pay such part of the cost of medical benefit as may be prescribed by national laws or regulations”. “Medical benefit may be withheld while the insured person is on board or abroad” and “whenever the circumstances so require, the insurance institution may provide for the treatment of the sick person in hospital and in such case shall grant him full maintenance together with the necessary medical attention and care”. When an insured person “is abroad and by reason of sickness has lost his right to wages, whether previously payable in whole or in part, the cash benefit to which he would have been entitled had he not been abroad” is to be “paid in whole or in part to his family until his return to the territory of the Member”. Many of the provisions of this Convention follow closely those of the Sickness Insurance (Industry, &c.) Convention, 1927, to which sixteen Members of the Organization are now parties, and the Sickness Insurance (Agriculture) Convention, 1927, to which eleven

Members of the Organization are now parties. The Sickness Insurance (Sea) Convention was adopted by the International Labour Conference by 60 votes to 5. The United Kingdom government, employers', and workers' delegates all voted for adoption.

The Hours of Work and Manning (Sea) Convention, 1936

This Convention applies to

"every sea-going mechanically-propelled vessel, whether publicly or privately owned, which: (a) is registered in a territory for which the Convention is in force; (b) is employed in the transport of cargo or passengers for the purpose of trade; and (c) is engaged on an international voyage, by which is meant any voyage from a port of one country to a port outside such country, every colony, overseas territory, protectorate or territory under suzerainty or mandate being regarded as a separate country."

Any Member may exempt vessels registered in its territory from the application of the Convention

"while such vessels are exclusively engaged in voyages upon which they do not proceed further from the country from which they trade than the nearby ports of neighbouring countries within geographical limits"

which fulfil certain conditions.

Part II of the Convention regulates hours of work. There are certain classes of persons, including officers in charge of departments who do not keep watch, to whom this Part does not apply. The general principle, which is to regulate the hours of work at sea and on arrival and sailing days of deck ratings, engine-room and stokehold ratings, deck officers and engineer officers, is that hours are not to exceed eight in the day or fifty-six in the week in the case of officers and ratings whose time is divided into watches, and eight in the day or forty-eight in the week in the case of officers and ratings employed as day workers. This principle is to apply: (a) to watch-keeping deck officers and ratings, in vessels of over 2,000 tons; (b) to watch-keeping engineer officers, in vessels required by the Convention to carry three or more engineer officers; and (c) to watch-keeping engine-room and stokehold ratings, and to day workers in the deck and engine-room departments, whether officers or ratings, in vessels of over 700 tons. Hours in excess of the above limits may be worked on arrival and sailing days, but whether or not such hours are to be worked and where such hours are allowed the conditions under which they are to be worked are to be determined by national laws or regulations or collective agreements. Additional hours may be worked by deck officers to the extent of one additional hour per day for navigational and clerical purposes and not more than four additional hours per day "occasionally when the master deems it necessary to order two officers to keep watch simultaneously". The general principle applicable in port to deck and engineer officers and deck, engine-room, and stokehold ratings is that of an eight-hour day and forty-eight-hour week. Much laxer rules are prescribed for ratings in the catering and clerical departments. Overtime is permitted by the Convention subject to the conditions that there is to be a right to compensation for it and that there is to be no consistent working of overtime. The "manner or rate or rates" of compensation for overtime are to be prescribed by national laws or regulations or to be fixed by collective agreement. No rating under the age of sixteen years is to work at night, which is defined as meaning "a period of at least nine consecutive hours between times before and after midnight to be prescribed by national laws or

regulations". The restrictions of hours are not to apply to certain enumerated types of exceptional work.

Part III of the Convention lays down manning standards. Every vessel of over 700 tons is to be sufficiently and efficiently manned for the purposes of (a) safety of life at sea, and (b) making possible the application of the rules relating to hours set forth in Part II of the Convention. The number of certificated deck officers to be carried in addition to the master is to be at least two in vessels of over 700 tons and at least three in vessels of over 2,000 tons. In vessels of over 700 tons the number of deck ratings carried is to be sufficient to allow three ratings to be available for each navigational watch. In vessels of over 700 tons but not exceeding 2,000 tons at least six deck ratings are to be carried, and in vessels of over 2,000 tons nine or such larger number as may be prescribed by national laws or regulations or fixed by collective agreement are to be carried. A proportion of these are to fulfil certain stated conditions of physical capacity and efficiency. At least three certificated engineer officers are to be carried either in vessels of over 700 tons or in vessels with engines exceeding 800 indicated horse-power, according as a tonnage or horse-power criterion is prescribed by national laws or regulations.

Part IV of the Convention consists of general provisions. Each Member which ratifies the Convention is to be responsible for the application of its provisions to vessels registered in its territory and is to

"maintain in force national laws or regulations which: (a) determine the respective responsibilities of the shipowner and the master for ensuring compliance therewith; (b) prescribe adequate penalties for any violation thereof; (c) provide for adequate public supervision of compliance with Part III before a vessel leaves a home port on an international voyage; (d) require the keeping of records of all overtime worked in pursuance of Article 10 and of the compensation granted in respect thereof; and (e) ensure to seamen the same remedies for recovering extra payments in respect of overtime as they have for recovering other arrears of wages."

In any case in which it comes to the knowledge of the competent authority of a port that a vessel registered in a territory for which the Convention is in force in virtue of ratification by another Member is not carrying the number of officers and ratings required by Part III of the Convention, the said authority is to notify the consul of the said Member. Exemption certificates may be granted for existing vessels in certain circumstances. Part V contains the final provisions.

This Convention was adopted by the International Labour Conference by 62 votes to 17. The United Kingdom government and employers' delegates voted against the adoption of the Convention and the United Kingdom workers' delegates for its adoption.

The Minimum Age (Sea) Convention (Revised), 1936

This is a revision of a Convention originally adopted in 1920 and now in force between thirty parties, including the United Kingdom, Australia, Canada, and the Irish Free State. The effect of the revision is to raise the minimum age of employment prescribed by the Convention from fourteen to fifteen subject to a proviso that "national laws or regulations may provide for the issue in respect of children of not less than fourteen years of age of certificates permitting them to be employed in cases in which an educational or other appropriate authority designated by such laws or regulations is satisfied, after having due regard to the health and physical condition of the child and to the prospective as well as to the immediate benefit to the child of the employment proposed, that such employment will be beneficial to the child".

This Convention was adopted by the International Labour Conference by 81 votes to 0. The United Kingdom government, employers', and workers' delegates all voted in favour of the Convention.

All six of the Conventions referred to in this note have been published in the *Official Bulletin of the International Labour Office*, Vol. XXI, No. 5.

C. W. JENKS.

CANADA: THE TREATY-MAKING POWER

WHATEVER else it may have done, the Judicial Committee of the Privy Council, in its most recent decision in the *References Case*,¹ has not contributed to the simplification of the task of governing Canada. The views expressed as to the treaty-making and implementing powers, however, are important and far-reaching. In 1919 Canada was represented, directly and by Canadians, at the Peace Conference in Paris. In due course Canada's representatives, together with those of the United Kingdom and the other Dominions, signed the Treaty of Versailles and the other Treaties of Peace, on behalf of Canada and as part of the British Empire. The Canadian Parliament later by resolution requested His Majesty to ratify these treaties on behalf of Canada and proceeded to implement them by appropriate legislation. As a result Canada became an original member of the League of Nations and of the International Labour Organization. In the course of the next fifteen years the latter organization proceeded to draw up, and to present to its member states for ratification and legislative action, a number of international conventions dealing with social questions. In 1935 Mr. Bennett, then Prime Minister of Canada, desiring to enact certain statutes providing for a weekly rest in industrial undertakings, minimum wages, and hours of work, and realizing that the Dominion's power to enact such legislation (because of the distribution of legislative powers between the Dominion and the Provinces, as set out in the British North America Act) was questionable, if not lacking altogether, ratified the conventions dealing with these matters. He then proceeded to have the Dominion Parliament implement the conventions by appropriate legislation. As there were doubts as to the validity of this legislation, Mr. King, who was returned to office in the autumn of 1935, asked the Supreme Court of Canada for its opinion. The Supreme Court divided evenly on the matter and the interested parties appealed to the Judicial Committee.

By section 132 of the British North America Act it is laid down that "the Parliament and Government of Canada shall have all Powers necessary or proper for performing the obligations of Canada or of any Province thereof, as part of the British Empire toward Foreign Countries arising under Treaties between the Empire and such Foreign Countries". But no definition or description is given of what is meant by "*Treaties between the Empire and Foreign Countries*" and it has been necessary, therefore, for the courts to decide on this point. Treaties, as a rule, are made by His Majesty, or between His Majesty and the head of another state or states, and the expression "British Empire" rarely, if ever, appears in a treaty. What, then, are Empire Treaties? Are they treaties to which His Majesty is a party? Are they treaties which apply to all parts of the

¹ *The A.-G. of Canada v. the A.-G. of Ontario and others*, Privy Council Appeal No. 100 of 1936, [1937] A.C. 326.

British Empire and Commonwealth? Are they confined to treaties in the making of which His Majesty is advised by his Ministers in London? Or may they include treaties made by His Majesty on behalf of Canada, and in the making of which His Majesty is advised by his Canadian Ministers? It was believed that this question was settled, and settled in a way which enabled the Parliament and Government of Canada to carry out the international obligations of Canada, including the implementation of Canadian treaties and conventions, by the necessary legislation—or such was the opinion of the Chief Justice, Sir Lyman Duff, his two colleagues, MM. Justices Davis and Kerwin, the former Prime Minister Mr. Bennett, and many other distinguished Canadians. Their views were based on the earlier opinions of the Canadian courts and particularly upon the views expressed from time to time by the Privy Council itself. Space does not permit a recitation of all the relevant judgments at length,¹ but the statements of the Privy Council in the two most recent cases must be set forth. In 1931, in the *Aeronautics* case,² Sankey L.C. speaking on behalf of the Privy Council, in considering whether Dominion legislation to give effect to the terms of the Aerial Convention of 1919, to which Canada, together with the rest of the Empire, was a party, was valid, stated that

“There may be cases where the Dominion is entitled to speak for the whole, and this not because of any judicial interpretation of ss. 91 and 92 but by reason of the plain terms of s. 132, where Canada as a whole, having undertaken an obligation, is given the power necessary and proper for performing such obligation”;

and further,

“Their Lordships . . . consider the governing section to be s. 132, which gives to the Parliament and Government of Canada all powers necessary and proper for performing the obligations towards foreign countries arising under treaties between the Empire and such foreign countries. . . . It would therefore appear that any Convention of the character under discussion necessitates Dominion legislation in order that it may be carried out.”

In the *Radio* case³ the Privy Council were faced with a somewhat different situation. Here the Dominion Parliament had passed legislation to give effect to a convention on radio communication, which the Canadian Government had ratified. Viscount Dunedin, who delivered the judgment of the Board, stated that, “the convention here is not a treaty between the Empire as such and foreign countries—but while this is so the aviation case in their Lordships’ judgment cannot be put on one side”. And further,

“In fine, though agreeing that the Convention was not such a treaty as is defined in s. 132, their Lordships think it comes to the same thing. On August 11, 1927, the Privy Council of Canada with the approval of the Governor-General chose a body to attend the meeting of all the powers to settle international agreements as to wireless. The Canadian body attended and took part in the deliberations. The deliberations ended in the Convention, with general regulations appended, being signed at Washington on November 25, 1927, by the representatives of all the powers who had taken part in the Conference and this Convention was ratified by the Canadian Government on July 12, 1928. The result is, in their Lordships’ opinion, clear. It is Canada as a whole which is amenable to the other powers for the proper carrying out of the Convention: and to

¹ *A.-G. B.C. v. A.-G. Ont.*, [1923] 4 D.L.R. 698; *Rex v. Stuart*, [1925] 1 D.L.R. 12.

² *Re Aerial Navigation*, [1932] 1 D.L.R. 58.

³ *Re Regulation and Control of Radio Communications*, [1932] 2 D.L.R. 81, [1932] A.C. 304.

prevent individuals in Canada infringing the stipulations of the Convention it is necessary that the Dominion should pass legislation which should apply to all dwellers in Canada."

It may be that the validity of the legislation in question was upheld on other grounds and that as far as this particular judgment is concerned this statement is *obiter*, but the fact that, as late as 1932, the Privy Council so interpreted the situation in Canada in respect of the making and implementing of treaties is of the utmost importance.

Turning now to the present case, we find Lord Atkin stating that,

"The first ground upon which Counsel for the Dominion sought to base the validity of the legislation was section 132. So far as it is sought to apply this section to the Conventions when ratified the answer is plain. The obligations are not obligations of Canada as part of the British Empire, but of Canada, by virtue of her new status as an international person, and do not arise between the British Empire and foreign countries. It is unnecessary, therefore, to dwell upon the distinction between legislative powers given to the Dominion to perform obligations imposed upon Canada as part of the Empire by an Imperial executive responsible to and controlled by the Imperial Parliament, and the legislative power of the Dominion to perform obligations created by the Dominion executive responsible to and controlled by the Dominion Parliament. While it is true, as was pointed out in the *Radio* case, that it was not contemplated in 1867 that the Dominion would possess treaty-making powers, it is impossible to strain the section so as to cover the un contemplated event."

The implication of this and the other portions of the judgment seem clear. The Canadian Government has the power to enter into international treaties, conventions, and agreements, but the Canadian Parliament in the majority of cases would seem to have no power to carry out these obligations in that most of them would deal with matters affecting Provincial rights. It may seem reasonable to a Privy Council sitting in London to say in the concluding section of their judgment that

"It must not be thought that the result of this decision is that Canada is incompetent to legislate in performance of treaty obligations. In totality of legislative powers, Dominion and Provincial together, she is fully equipped. But the legislative powers remain distributed, and if in the exercise of her new functions derived from her new international status she incurs obligations they must, so far as legislation be concerned when they deal with provincial classes of subjects, be dealt with by the totality of powers, in other words by co-operation between the Dominion and Provinces. While the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure."

But it is cold comfort to a Canadian living in Canada, who knows that the problem of getting agreement among the Provinces of Canada is difficult if not impossible, and who knows, too, that such a handicap makes it practically impossible for Canada to enter into any treaty. For not only must it have the agreement of the Provinces before negotiating any treaty, but even granted this it is always open to a Province to change its mind at any time. It may even repeal legislation giving effect to the terms of the treaty—for it has no international obligations—and leave the Dominion facing reprisals for the breach of an international agreement without any method of preventing or remedying such breach. Surely, if it seemed necessary to give the Dominion Parliament power to implement treaties negotiated by the Imperial Executive, which already had a supreme Imperial Legislature at hand to do its will if necessary, it is doubly

necessary in the present circumstances. Nor is the danger to provincial rights, which their Lordships seemed so concerned with averting, a serious one, if the experience of the United States means anything. For no Dominion Executive or Legislature is likely to introduce by the treaty route, or any other route, any questionable measures or legislation unless it has pretty general support throughout the country—that is, the Provinces. To do so would mean political annihilation and no democratic government or party is prepared to face that. The result of their Lordships' decision seems to be: that for international purposes Canada is no longer a nation, not even a league of nations, but a strange agglomeration in which the parties with power (the Provinces) have no status (internationally), and the party with status (the Dominion) has no power. Possibly the obvious solution to the onlooker would seem to be in an amendment to the British North America Act, but to me, at least for the time being, that seems out of the question.

NORMAN MACKENZIE.

AUSTRALIA: FEDERAL STATES IN EXTERNAL RELATIONS

As a matter of history, one of the main objects held in view by federating communities has been to enable the federating groups to act as one unit *vis-à-vis* the outside world. From the point of view of other countries, and perhaps also from that of the federations themselves, it would no doubt be convenient if in dealing with the organs of the federal government other countries could ignore altogether internal questions as to the distribution of powers between the federation and its component states or provinces. That this was indeed the true position of federal states was in fact generally accepted at the Codification Conference of 1930. So far as concerns the two British federal Dominions, however, the courts have recently had to consider the extent to which the relevant constitutional instruments are framed in terms which do permit this. The cases to be considered here¹ determine the power of the Commonwealth in Australia to make laws for implementing a treaty irrespective of its subject-matter, and the operation between Australia and New Zealand of the Fugitive Offenders Act, 1881.

As is well known, the Commonwealth Parliament is a legislature having powers with respect only to certain enumerated subject-matters, the residue remaining with the states. No express power is given, as in the case of Canada, to make laws implementing treaties, nor is there any provision, as in the United States, giving treaties the force of law. If therefore the Commonwealth government becomes subject to treaty obligations whose subject-matter falls ordinarily within the legislative competence of the states, must the discharge of these obligations depend on the willingness of the states to take the necessary legislative action? As the range of international negotiation and arrangement extends more and more to matters of social, industrial, and commercial concern, as more and more conventions lay down the standards to be followed by the parties in regulating their own internal affairs, this predicament recurs ever more frequently. Soon after federation, the Commonwealth asserted that its express constitutional power to make laws with respect to "external affairs" did enable the Commonwealth to execute all treaties binding upon it. More recently, however, in the absence of judicial interpretation of this phrase, a much more cautious and limited view has generally been acted upon.

¹ A decision by the Privy Council on a similar point in relation to Canada is the subject of a note on p. 172 of this volume.

In *R. v. Burgess, ex p. Henry*,¹ a person who had been prosecuted for having piloted an aircraft without a licence upon a civil journey in New South Wales challenged the validity of the Commonwealth's licensing regulations, which purported to be made to "give effect to" the Air Navigation Convention of 1919, to which Australia is a party. No question arose as to the power of the Commonwealth to control air navigation so far as it might be involved in the exercise of any of its express powers: as with respect to defence, postal services, or interstate and overseas trade. But the Air Navigation Act had been passed, as a matter of record, in (unrealized) anticipation that the states would, as promised, "refer" the whole subject of aviation to the Commonwealth, and the regulations did in fact purport to operate upon any and every use of aircraft in Australia. In this particular case the journey had been wholly in the course of intra-state commerce: a matter left by the constitution to the states alone, unless the "external affairs" power were given a meaning wide enough to include it. Unanimously the High Court of Australia took the affirmative view on this point. (The regulations actually made were held invalid by the majority of the court, but only as departing substantially from the terms of the treaty which they purported to "give effect to"; this does not, of course, affect the general principle laid down.) The making of a treaty was held by the whole court to be effective in Australia to bring within the scope of the powers of the federal legislature subjects which without a treaty would be beyond those powers. The same appears to be true of the United States, and (within the limits of s. 132 of the British North America Act at any rate) in Canada also.

Precisely how far this decision extends is left intentionally at large by the majority of the court. Attempts were indeed made in argument to limit the Commonwealth's power to "matters which *in se* affect external relations", but these attempts failed. *Evatt and McTiernan JJ.*, in a fully reasoned joint judgment, say expressly, by way of illustration, that in their view the Commonwealth has power to implement the Conventions framed by the International Labour Organization, and that Australia has been in error in treating herself as a country to which the special procedure of the sixth paragraph of Article 405 of the Treaty of Versailles is applicable. On this point the other Justices express no opinion. The whole court is, however, in agreement in certain negative propositions of great importance: that the suggestion that a Commonwealth government might make an international agreement in bad faith, with the mere object of extending federal powers, can be left to be dealt with when it arises, and that (as *Latham C.J.* puts it) "it is impossible to say *a priori* that any subject is necessarily such that it could never properly be made the subject of international agreement". There is no doubt room for subsequent differences of judicial opinion. But for ordinary purposes of international intercourse it may now be assumed that the Commonwealth of Australia has full power to execute in Australia, by its own legislative action, any treaty entered into with other countries.

Australian federalism has also raised some curious questions in the working of the Fugitive Offenders Act, 1881, as between Australia and New Zealand. Part II of the Act sets up a specially simple and expeditious procedure for use within groups of British possessions, to be constituted by Order in Council upon the basis of contiguity. One such group consists of *the Commonwealth of Australia* (together with its dependent island territories), New Zealand (with Western Samoa), and the British islands in the Western Pacific. The Australian member

¹ (1936) 55 C.L.R.

of the group being the Commonwealth (and not the states) it has been contended that not the country but the Commonwealth government is the unit of jurisdiction. It would follow, for example, that Part II could not operate in respect of offences against state (as distinct from Commonwealth) laws, or through the instrumentality of magistrates deriving their authority from a state (and not from the Commonwealth).

In *in re Munro and Campbell*,¹ the former contention was adopted by the Supreme Court of New Zealand, led in part by reasoning which had found favour with the High Court of Australia thirty years ago, and which the High Court has now subsequently disapproved. The prisoners, it is true, were rearrested and duly surrendered under the provisions of Part I of the Act. But, the general criminal law falling within the legislative sphere of the states rather than that of the Commonwealth, the Supreme Court's decision had the result of depriving Australia of the more suitable procedure of Part II, except in the (relatively rare) cases of offences against Commonwealth laws. A year later, the High Court of Australia unanimously rejected the disjunctive view of the effect of the Australian federal system upon which the New Zealand decision was based. In *McArthur v. Williams*,² the court refused to treat as a ground for quashing an order for the return of the prisoner to New Zealand the fact that the magistrate who made the order was a stipendiary magistrate of the state of New South Wales. In a joint judgment Dixon Evatt and McTiernan JJ. say:

"When the return by Australia of a fugitive from another British possession is sought, the authority must be invoked of those judicial and executive officers who under the law of Australia occupy offices which satisfy the descriptions which the Imperial statute adopts for vesting the requisite powers over the persons of fugitives. But they no less satisfy those descriptions when their offices are established under the law of a State and not under the law of the Commonwealth.

"When it is a fugitive from Australia whose return is sought from another jurisdiction of the Crown, it is in our opinion of no importance whether the offence for which his apprehension is sought is an offence against the law of a State or against the law of the Commonwealth. State law is part of the total content of the law in force in Australia. . . .

"It is not the federal government which is the unit of jurisdiction but the country."

On principle, this seems to be the better view. Here again, the internal distribution of powers within a federal community becomes a matter of indifference *vis-à-vis* the outside world. Starke J. in the High Court of Australia usefully points out that this is also the view held by the Supreme Court of the United States in regard to the extradition system.³

K. H. BAILEY.

THE COMMONWEALTH OF AUSTRALIA AND ANTARCTICA

THE British claim to territorial sovereignty over the Australasian sector of Antarctica is based on discovery. It was made and published in the *Proceedings of the Imperial Conference, 1936: Summary of Proceedings*, pp. 33-4.⁴ During the season 1929-30 Sir Douglas Mawson hoisted the British flag at Possession

¹ (1935) N.Z.L.R. 159.

² (1936) 55 C.L.R. 322.

³ *Wright v. Henkel* (1903), 190 U.S. 40; *Factor v. Laubenheimer* (1933), 290 U.S. 276.

⁴ See Gustav Smedal: *Acquisition of Sovereignty over Polar Seas*, pp. 50-1 (Oslo), 1931.

Inlet on Kemp and Enderby Land, taking possession in the name of King George V.¹

By prerogative Order in Council of February 7, 1933, made by the late King George V, sovereign rights were affirmed over "that part of the territory in the Antarctic seas which comprises all the islands and territories, other than Adélie Land, situated south of the sixtieth degree of South Latitude and lying between the one hundred and sixtieth degree of East Longitude and the forty-fifth degree of East Longitude . . ."; and this territory, within the specified limits, was placed under the authority of the Commonwealth of Australia subject to the passing of legislation by the Parliament of the Commonwealth providing for the acceptance of the said territory and the government thereof and the fixing of a date by the Proclamation of the Governor-General of Australia.²

The Parliament of the Commonwealth of Australia accepted the said territory by passing the Australian Antarctic Territory (Acceptance) Act, to be brought into force by Proclamation.³

By Proclamation of the Governor-General the aforesaid Act and the Federal Whaling Act, 1935, were brought into operation as from August 24, 1936, and regulations under the latter Act were issued for regulation of whaling by the Commonwealth.⁴

The Whaling Act is made under Section 51 (X) of the Constitution Act which empowers the Parliament to make laws in respect to "fisheries in Australian waters beyond territorial limits".

The Whaling Act (like the Imperial Whaling Industry (Regulation) Act, 1934 (24-25 Geo. V, c. 49)) was passed to implement the provisions of the International Convention for the regulation of whaling, drawn up under the auspices of the League of Nations in 1931, and signed on behalf of Australia. The Convention has been ratified by twenty-five countries, including the United Kingdom, Norway, the United States of America, Finland, France, Canada, South Africa, and New Zealand—but not by Germany or Japan.⁵

The legislative power of the Commonwealth in respect of whaling being limited as above mentioned, it would be necessary, in order to implement the Convention fully, to have legislation covering Australian territorial waters—a subject-matter which is within the jurisdiction of the states. Complementary legislation on the lines of the Commonwealth Act of 1935 was recommended to the states by the conference between Commonwealth and state Ministers held at Adelaide from August 26 to 28, 1936, when a serious view was taken of the excessive destruction of whales, particularly in Antarctic waters. It may be mentioned that in February 1934, when the topic was discussed at a similar conference, hopes had been entertained that the states might refer the requisite powers to the Commonwealth in order to permit legislation on fisheries within state territorial waters, and to control whaling generally. Later it became apparent, however, that only two states were willing to cede the necessary power, and the Commonwealth has thus been constrained to legislate within its own jurisdiction, leaving the states to cover their own territorial waters by similar legislation. Except for completeness

¹ See report by Sir Douglas Mawson on the work of R.S.S. *Discovery*, season 1929-30 (*Federal Parliamentary Paper No. 80. F. 1937*).

² See Order in Council of February 7, 1933, in *S.R.O. 1933*, p. 2089.

³ See No. 8 of 1933 in *Commonwealth Acts, 1933*, p. 12.

⁴ See *Statutory Rules, 1936*, No. 114.

⁵ See the *Year Book*, Vol. XVI (1935), p. 168.

of control, it is more vital for the Commonwealth to regulate the industry in the Antarctic than in Australian territorial waters.

A. H. CHARTERIS.

AUSTRALIAN NATIONALITY LEGISLATION¹

NATIONALITY OF MARRIED WOMEN

THE Nationality Act, No. 62 of 1936, of the Commonwealth Parliament, amends the Nationality Act 1920-30, and, while bringing it generally into line with the most recent Imperial and Dominion legislation on the subject, introduces important amendments in the provisions dealing with the national status of married women. Section 18 of the 1920-30 Act provided that the wife of a British subject should be deemed to be a British subject and the wife of an alien should be deemed to be an alien. By the first proviso to this section, where a man ceased during the continuance of his marriage to be a British subject, his wife might make a declaration that she desired to retain British nationality, and thereupon she was deemed to remain a British subject. By the second proviso to the same section, where an alien was a subject of a state at war with His Majesty, his wife might, if she was at birth a British subject, make a declaration that she desired to resume British nationality, and thereupon the Governor-General, if satisfied that it was desirable that she should be permitted to do so, might grant her a certificate of naturalization.

However, certain cases arise in which this provision afforded no relief and even caused considerable hardship. The most frequent example was that of an Australian woman, by birth a British subject, who married an alien, e.g. a United States citizen. By the operation of the above section, she immediately lost her British nationality and became an alien. By United States law, however, her marriage to a United States citizen did not, after 1922, invest her with United States citizenship which, however, she was entitled to apply for in her own name after twelve months' residence in the United States and after fulfilling certain other conditions. During the interval between her marriage and her naturalization in the United States she was a "stateless" person.

¹ *The Times* of June 16, 1937 records that the report adopted by the Imperial Conference of this year states that: "The Australian and New Zealand delegations, in opening the discussion, called attention to the legislation recently passed in the Commonwealth of Australia and New Zealand which does not affect the common status of British subjects, but under which a woman who prior to her marriage was a British subject, but ceased to be a British subject by reason of her marriage to an alien, may retain within the Commonwealth of Australia or New Zealand respectively the political and other rights and liabilities of a British subject.

"A full discussion took place on the various aspects of the whole question, including:

- (a) the enactment of legislation to provide that the nationality of married women should not necessarily be dependent on that of their husbands,
- (b) the possibility of securing reciprocal arrangements on the basis of the general adoption of legislation on the lines of the Australian and New Zealand legislation, and
- (c) the state of the law in countries outside the British Commonwealth.

"It was not found possible to arrive at an agreement in favour of any change in the existing law. While therefore the Committee was unable to put forward any recommendations, it was assumed that the matter would be the subject of further consideration by and consultation between the respective Governments."

The new section 18 inserted by the 1936 Act aims at rectifying this anomaly. It enacts that subject to certain provisos the wife of a British subject shall still be deemed to be a British subject, and the wife of an alien shall be deemed to be an alien.

By sub-section 2, however, where a woman has (whether before or after the commencement of this Act) married an alien, and was immediately before her marriage a British subject, she shall not, by reason only of her marriage, be deemed to have ceased to be a British subject unless, by reason of her marriage, she acquired the nationality of her husband.

By sub-section 3, where a man has during the continuance of his marriage ceased (whether before or after the commencement of this Act) to be a British subject, his wife shall not by reason only of that fact be deemed to have ceased to be a British subject unless, by reason of the acquisition by her husband of a new nationality, she also acquired that nationality.

By sub-section 4, where a man ceases during the continuance of his marriage to be a British subject and, by reason of his acquisition of a new nationality, his wife also acquires that nationality, she may, whether her marriage is still continuing or not, within one year from the date on which she acquired such nationality, or within such further time as the Minister in special circumstances allows, make a declaration that she desires to retain British nationality, and thereupon she shall be deemed to have remained a British subject.

By sub-section 5, where after March 31, 1937, a certificate of naturalization is granted to an alien, his wife, if she is not already a British subject, shall not be deemed to be a British subject unless, within one year from the date of such certificate, or within such further time as the Minister in special circumstances allows, she makes a declaration that she desires to acquire British nationality.

Sub-section 6 of the new section is in the same terms as the second proviso to s. 18 of the 1920-30 Act.

The new Act also inserts a further section 18A (copied from a similar provision in the corresponding New Zealand Act) which applies to married women who, by reason of their marriage to aliens, have acquired the nationality of their husbands. Any woman to whom this section applies, whether her marriage is still continuing or not, may:

- (a) in the case of a woman married to an alien before the commencement of this section, at any time within twelve months after the commencement of this section,
- (b) in the case of a woman married to an alien after the commencement of this section, within twelve months after the date of her marriage,
- (c) in either case at such later time as the Minister in special circumstances allows,

make a declaration that she wishes to retain while in Australia or any territory the rights of a British subject, and thereupon she shall within Australia or any territory be entitled to all political and other rights, powers, and privileges, and be subject to all obligations, duties, and liabilities to which a natural born British subject is entitled or subject.

There were other difficulties which arose under the 1920-30 Act which deserve mention.

Under that Act, as before mentioned, an Australian woman, by birth a British subject, lost her British nationality on marriage with an alien, e.g. a United States citizen, without thereby acquiring United States citizenship. If she wished

to travel to the United States she was no longer able to obtain a British passport nor had she the right to a United States passport. She could, however, obtain from the Commonwealth Customs Department a "permit to travel" which allowed her to leave Australia. For her to gain entry into America it was necessary for her husband to address a petition to the State Department at Washington for permission for his wife to enter the States as a "non-quota immigrant". Such a petition was granted in ninety-nine cases out of a hundred, and Washington authorized the Consulate in the relevant Australian state to stamp the permit to travel with a "non-quota visa". A permit so stamped enabled the alien wife to enter the United States without being subject to the restrictions of the quota system of immigration. There was therefore no difficulty in cases where the wife either accompanied the husband back to the United States or later followed him at his desire.

Where, however, the husband, a United States citizen, married the wife, a British subject, in Australia, and thereafter deserted her and returned to America, the wife's position was much more difficult; cases of this type quite frequently arose concerning Australian women and members of the crews of American ships calling at Australian ports. As the husband's domicile was presumably in the United States, no matrimonial relief was available to the wife in the Australian courts. By the British rules of private international law a married woman cannot acquire a domicile apart from that of her husband and must seek her matrimonial relief in the courts to which he is subject by domicile of succession. From inquiries made from the immigration expert attached to the United States consulate in Sydney, I understand that if the deserted wife wished to proceed to the United States for the purpose of taking divorce proceedings, she would probably have little difficulty, if she had sufficient means, in obtaining entry to the United States as a traveller for a short period. If, however, she wished to proceed to the United States to take up permanent residence there, and her husband was not prepared to petition for her to be classified as a non-quota immigrant, she would be subject to all the restrictions, including the quota system, imposed on immigration. The fact that the husband had deserted her and left her without means would be one matter which might be sufficient to prevent her entry, as there would be a likelihood of her becoming a charge on the United States.

The 1936 Act alleviates this to a certain extent. Such a woman would retain her British nationality until such time as she acquired a new one, and would thus be able to obtain a British passport for the purposes of travel. The difficulties with regard to entry into the United States, however, still remain.

ALLAN J. EASTMAN.

SOUTH AFRICA: NATIONALITY QUESTION

IN a previous note¹ the writer referred to certain difficulties apparent in the Union Nationality and Flags Act (No. 40 of 1927). The decision of the Cape Provincial Division of the Supreme Court in the case of *Principal Immigration Officer v. Edelstein*² demonstrates the existence of further latent complications resulting from more recent Union legislation relating to immigration. In terms of section 1 of that Act the acquisition of Union nationality, whether by virtue of

¹ *B.Y.I.L.*, Vol. XVII, 1935, p. 187.

² (1936) C.P.D. 114.

birth or domicile in the Union, is conditional on the *de cuius* not falling in the category of prohibited immigrant. In particular section 1 (d) in attributing Union nationality to "a person born outside any part of South Africa included in the Union whose father was a Union national at the time of such person's birth and was not in the service of an enemy state" provides "that nothing in this paragraph contained shall apply to any person who, if he enters or is found in the Union, would in terms of any law relating to immigration be a prohibited immigrant". It was this proviso which had to be considered in the case quoted.

At the time when the Nationality Act became law, immigration was regulated by Act 22 of 1913 (as amended by Act 37 of 1927) which still remains the principal Act. Section 4 of this Act extensively defines "prohibited immigrant", whilst section 5 enumerates persons or classes of persons who are absolutely or conditionally exempted from that category. For example, a person afflicted with leprosy is a prohibited immigrant (sect. 4 (1) h), unless born to parents domiciled in the Union at the time of his birth (sect. 5 (e)); consequently, whether or not a person born outside the Union to a father, a Union national not domiciled in the Union, is himself a Union national may depend on whether or not he is a leper (sect. 1 (d) Act 40 of 1927).

The Immigration Quota Act (No. 8 of 1930) extended the definition of "prohibited immigrant". Briefly, every person born in any country not specified in the Schedule to the Act¹ who has not been permitted to enter the Union as part of the annual quota is to be deemed a prohibited immigrant for the purposes of the principal Act.² For the purposes of the Act the wife or child under twenty-one years of age of any person shall be deemed to have been born in the same country as any such person.³ Nevertheless, any person who is a Union national in accordance with the provisions of the Nationality Act is to be exempt from the quota provisions.⁴

In *Principal Immigration Officer v. Edelstein* the defendant, a minor, had been served with a notice declaring her a prohibited immigrant in terms of Act 8 of 1930. At the time of her birth in Syria, her father, also born in Syria, was a Union national by virtue of naturalization as a British subject in the Union and the requisite period of domicile therein. Being both born and deemed to be born in a non-scheduled country Miss Edelstein was therefore a prohibited immigrant unless a Union national in accordance with the provisions of the Nationality Act. On the other hand, by section 1 (d) of the Nationality Act, her father at the time of her birth having been a Union national, Miss Edelstein was herself a Union national if not a prohibited immigrant. The court was thus faced with an apparent *circulus inextricabilis*, somewhat akin to that associated with the doctrine of *renvoi* in private international law. If Miss Edelstein was a Union national she could not be deemed under Act 8 of 1930 a prohibited immigrant, whereas her Union nationality itself depended, in accordance with the Nationality Act, on her not being deemed a prohibited immigrant.

The court, by a process of reasoning which cannot be examined here but which, it is submitted, would not survive examination, came to the conclusion that the Legislature never intended when it passed Act 8 of 1930 that the proviso to paragraph (d) of section 1 of Act 40 of 1927 should be read as being subject to

¹ Scheduled countries are: Territories comprised in British Commonwealth, Austria, Belgium, Denmark, France, Germany, Holland, Italy, Norway, Portugal, Spain, Sweden, Switzerland, U.S. of America.

² Section 5.

³ Section 4 (c).

⁴ Section 9 (b).

section 5 of the later Act. In consequence it held Miss Edelstein to be a Union national and as such exempt from the provisions of section 5 of Act 8 of 1930.

The facts of the case, quite apart from the decision, serve to illustrate the difficulties and complexities which the introduction of Dominion nationality has created in the Union of South Africa. These complexities are aggravated by the modern tendency in general to break away from the older principles of locality of birth and descent as the foundations of nationality and to substitute as criterions such circumstances as domicile and immigrant status. The trend of nationality legislation would appear to be distinctly away from any ideal of uniformity.

E. E.

THE MANDATED TERRITORY OF SOUTH-WEST AFRICA

DIFFICULTIES experienced by the Government of the Union of South Africa in its administration of this Territory have formed the subject of previous notes.¹ The events of the past year merit further consideration as indicating the policy which will be adopted to counter those difficulties. As a consequence of the introduction and spread of Nazi propaganda and activities amongst the German element of the Territory's population and the resultant attitude of non co-operation adopted by that element, the Union section was enabled to pass by the requisite constitutional two-thirds majority of the South-West Assembly a resolution in favour of the administration of the Territory as a fifth province of the Union. The Union government accordingly, in 1935, appointed a Commission of three with very wide terms of reference to inquire into the affairs of the Territory. This Commission reported in June 1936.² Whilst in agreement as to the unsatisfactory state of the Territory and as to its causes, viz. the non-co-operation policy of the bulk of the inhabitants of German descent, the members of the Commission were unable to make any unanimous recommendation as to the nature of the remedies to be applied.

The Union government has lost little time after consideration of the Commission's report in stating its immediate policy with reference to the Territory. In the first place, in order to allay any sense of insecurity about the future, the Government states that it is not prepared to consider the possibility of the transfer of the mandate to another Power, and wishes to assure the people of South-West Africa that it has as little thought of abandoning the Mandate as it has of abandoning its own territory. "No one need, therefore, be perturbed by the statements of persons who, for political reasons, make play of the imminent return of the Territory to Germany." In the second place, although of the opinion that to administer the mandated territory as a fifth province of the Union, subject to the terms of the mandate, would not be in conflict with the terms of the mandate itself, the Government feels that subject to certain safeguards the existing form of administration should be given a further trial. As one such safeguard the Government will render it impossible for aliens to become or be members of public bodies or of political or other organizations wherever the Administration deems it undesirable. As a further safeguard the Government will take all available measures against acts incompatible with loyalty by those who, whatever their descent, have accepted Union nationality. In this connexion it is emphasized that any claim to double nationality within the Territory has no

¹ *B.Y.I.L.*, Vol. XV, p. 147; Vol. XVI, p. 160.

² U.G. No. 26, 1936.

foundation in law or fact. In terms of the Union-German Agreement of 1923, Germans naturalized as Union nationals are in the mandated territory exclusively Union nationals. "Every claim, demand or excuse *vis-à-vis* the Mandatory, based on German nationality, is unjustified and founded on untenable grounds."

The Government policy with its safeguards would appear to be an adequate solution of the impossible situation created by the Nazi doctrine of not merely a divided allegiance owed by inhabitants of German descent in the Territory, but also of the superior claims therein of a Power foreign to the Mandatory. There is to be no interference with purely cultural development, and there is the same readiness as formerly on the part of the Government to recognize German as an official language in the mandated territory. One point, however, seems to have escaped due recognition. On the main subject of the mandate—the indigenous inhabitants—the Commission recommended that more active steps be taken by the Mandatory for the development of the non-European races from their present backward condition, and it must be remembered that out of an estimated total population of 267,000 only some 31,000 are Europeans. Seemingly, the only reference in the official communiqué to this overwhelming majority of the inhabitants lies in the final appeal to all sections of the population of the Territory "to co-operate in a spirit of devotion to the interests of the whole population in promoting the welfare of the Territory". Once again the problems of the European elements would appear to have obscured the real object of the mandate.

E. E.

THE CREDENTIALS OF THE ABYSSINIAN DELEGATION TO THE SEVENTEENTH ASSEMBLY OF THE LEAGUE OF NATIONS

THE Seventeenth Assembly of the League of Nations was confronted, in September 1936, with a problem which the framers of the Covenant did not foresee and could not properly have attempted to foresee. That problem was the continued right of representation in the Assembly of a state whose territory has been invaded, occupied and formally annexed by a fellow member of the League in indisputable breach of the Covenant. On May 2, 1936, the Emperor of Abyssinia, confronted by an overwhelming force, left his country. On May 5 the Italian troops entered the capital of Abyssinia. On May 9 an Italian Royal Decree purported to place Abyssinia under Italian sovereignty. On September 16 the Abyssinian Legation in London issued a statement to the effect that there existed in the west of Abyssinia a regular government exercising normal functions of administration under the authority and in accordance with the instructions of the Emperor of Abyssinia. On the same day the Abyssinian Legation in London announced that Abyssinia was sending a delegation to the forthcoming session of the Assembly. It soon became known that, while Italy did not intend to raise the question of the status of Abyssinia at the Assembly, she would regard the admission of the Abyssinian delegation as a ground for not sending her own. The Credentials Committee of the Assembly was thus confronted with a task of the utmost delicacy, and there was accordingly some difficulty in inducing the representatives of the various Governments to serve on the Committee. The Committee as eventually chosen was composed of the representatives of the following states: France, Great Britain, Peru, the Soviet Union, the Netherlands, Czechoslovakia, New Zealand, Greece, and Turkey.

In dealing with the question of Abyssinia the Committee was guided by

Article 5 of the rules relating to the procedure of the Assembly, which provides as follows:

"1. Each member shall communicate to the Secretary-General, if possible one week before the date fixed for the opening of the session, the names of its representatives, of whom there shall not be more than three. The names of substitute representatives may be added.

"2. The full powers of the representatives shall be delivered to the Secretary-General, if possible, one week before the date fixed for the opening of the session. They shall be issued either by the head of the state or by the Minister for Foreign Affairs.

"3. A Committee of nine members for the examination of the credentials shall be elected by the Assembly on the proposal of the President. The Committee shall report without delay.

"4. Any representative to whose admission objection has been made shall sit provisionally with the same rights as other representatives, unless the Assembly decides otherwise."

The Committee, after having discarded the suggestion that the Permanent Court of International Justice might be asked to give an Advisory Opinion on the question whether the representatives of Abyssinia were entitled to sit at the Assembly, recommended the admission of the Abyssinian delegation. It is convenient to quote the crucial passages of the Committee's Report relating to the credentials of the Abyssinian delegation:

"Its credentials are derived from the same authority as had more than once in the past issued the full powers of the Ethiopian delegation to previous sessions of the Assembly. On the dates on which they were issued (September 14 and 19), however, the situation in Ethiopia had greatly changed in various respects. The head of the state is in a foreign country; the government is no longer in the capital; according to some of the documents submitted, a governmental authority is stated to be established in another part of the country. It seems exceptionally difficult to judge of the nature and extent of the power of that authority, and of the strength of the connexions still existing between it and the head of the state. The question that accordingly presented itself to the Committee was whether the head of the state from whom the credentials under examination emanate was exercising his legal title effectively enough to make those credentials perfectly in order. . . . the best solution would be to propose that the Assembly should consider the credentials submitted by the Ethiopian delegation, despite the doubt as to their regularity, as sufficient to permit that delegation to sit at the present session."¹

It pointed out that in situations like that with which the Committee was confronted "the delegation in question should have the benefit of the doubt" and that "by the adoption of the solution indicated, which holds good only for the present session, nothing is done to prejudice the future".

This Report, which was adopted by the Assembly on September 23, seems to have dealt with the difficulty on the purely factual basis of the effectiveness of the power of the lawful government in some parts of Abyssinia. It is a fair implication from the Report that should it become definitely established that there no longer exists an organization meriting the designation of an independent government and exercising authority on behalf of the Emperor of Abyssinia, the Assembly might refuse to recognize the continued validity of the credentials of a delegation appointed by the Emperor of Abyssinia.

¹ League Document A. 41. 1936. Reprinted in *Documents on International Affairs, 1935*, ed. by Stephen Heald, p. 545.

It may be a matter of dispute how far the Assembly is entitled, by laying down the conditions of effectiveness of the administration on the part of the government concerned, to question the legality of credentials regularly issued by the lawful sovereign of a recognized state, a member of the League. However that may be, the decision of the Assembly is probably not relevant to the question of membership. Even if the Assembly were at some future date to decide that the credentials issued by the Emperor of Abyssinia can no longer be recognized, that decision would not affect the question of the Abyssinian membership of the League. Abyssinia would continue as a member of the League so long as the League as a whole or the substantial majority of its members have not *de jure* recognized the annexation of Abyssinia by Italy, or so long as its membership of the League has not terminated as the result of expulsion under Article 16 (4) or voluntary withdrawal under Article 1 (3). The refusal to recognize the validity of the credentials issued by the lawful sovereign of a state would mean in practice a suspension from the exercise of rights of membership of the state concerned, with the concomitant provisional cessation of its duties, financial and otherwise, to the League. The same result might be brought about if the Emperor of Abyssinia were to inform the League that, in view of the occupation of Abyssinia by a hostile army and the cessation of normal governmental functions, he does not propose for the time being to be represented at the Assembly and, generally, in the activities of or conferences convened under the auspices of the League. A step of that nature, while fully safeguarding the ultimate interests of Abyssinia, might well obviate the necessity of or inducement to decisions prejudicial to the cause of the League and to the authority of international law.

H. LAUTERPACHT.

THE STRAITS CONVENTION OF MONTREUX, 1936

I

CERTAIN questions of general legal interest arose in connexion with the Conference held at Montreux in June and July 1936, for the purpose of revising the régime which had been in existence regarding the Dardanelles and the Bosphorus since the treaty of peace made with Turkey after the war. The history of this matter is, in very brief outline, as follows:

Originally, the Black Sea as well as the Bosphorus and Dardanelles was entirely enclosed by Turkish territory. The problem of passage through the Straits in its modern form did not then exist, but only came into being when, in the eighteenth century, Russia acquired territory on the Black Sea. Turkey then instituted the rule that foreign warships could not proceed through the Straits in either direction; though, on the other hand, free navigation was conceded to the merchantmen of foreign states with whom Turkey concluded treaties for that purpose. The rule concerning warships became definitely established by the Convention of London of 1841 between the United Kingdom, Turkey, Austria, France, Prussia, and Russia, in the sense not only that Turkey was entitled to exclude foreign men-of-war, but also that she was bound to do so. This position, reaffirmed in the Treaties of Paris (1856) and London (1871), was kept up throughout the century and until the war of 1914-18. Up to the war, therefore, the régime was that of a closed Straits so far as warships were concerned.

After the war, a Straits Convention was made as part of the general peace

settlement of Lausanne with Turkey in 1923. This Convention established for the first time the principle of an open Straits—freedom of transit and of navigation for the warships as well as for the commercial vessels of all nations. In time of peace both merchant ships and warships were to have complete freedom of passage. A difference was, however, established between the Black Sea and the non-Black Sea Powers in regard to warships. While there was no limit on the number of warships which the former could send from the Black Sea into the Mediterranean, no non-Black Sea Power was allowed to pass into the Black Sea a force greater than that of the most powerful fleet of a Black Sea Power existing in the Black Sea at the date of the passage. In time of war, Turkey being neutral, the same freedom of passage was provided for merchant ships and warships; and under the same conditions as in time of peace, except that the restriction on the total force of a non-Black Sea Power going into the Black Sea was not, in the case of belligerents, to be applicable to the prejudice of their belligerent rights. In time of war, Turkey being belligerent, the same rights were provided for *neutral* merchantmen and warships.

In addition to these provisions regarding transit, the Straits Convention of Lausanne demilitarized the zone of the Straits; and in return for this the High Contracting Parties, with especial reference to France, the United Kingdom, Italy, and Japan, guaranteed Turkey against attack on the Straits.

Early in 1936 the Turkish Government raised the question of the demilitarization provisions of the Lausanne Convention. They stated that the existence of these provisions in the then political situation rendered Turkey insecure, especially as it was no longer possible to regard the above-mentioned guarantee as constituting an effective substitute for the normal means of defence which Turkey would have established in the zone of the Straits but for the demilitarization provisions. The Turkish Government therefore asked for a Conference, the object of which would be to free Turkey from these provisions. At the same time they raised the question of passage through the Straits, particularly as regards warships, stating that Turkish security would also require certain modifications in the existing passage régime.

The outcome was the Convention of Montreux signed on July 20, 1936. The régime established thereby was as follows: the general principle of freedom of transit through the Straits established by the Lausanne Convention was expressly preserved and reaffirmed in the new Convention; and moreover given an unlimited duration (Articles 1 and 28), though the rest of the Convention may determine after twenty years. The practical application of this principle was, however, modified in a number of respects. The position as regards merchantmen was left substantially unchanged; but as regards warships, various limitations were imposed. The total tonnage of warships which could at any one time find themselves in passage through the Straits was fixed at 15,000 tons. (Not 15,000 tons for each individual Power, but an absolute prohibition of the presence of more than 15,000 tons of foreign warships in the Straits at any one moment.) Passage for capital ships was forbidden altogether except for the Black Sea Powers, who were allowed to send through one capital ship at a time, escorted by not more than two torpedo-boats. Passage for submarines was also forbidden except that Black Sea Powers were given the right to bring through the Straits into the Black Sea submarines which they had constructed or purchased outside; and to send submarines out for repair and bring them back. All passage was made subject to the giving of prior notification to the Turkish Government. In

addition to the above provisions, while no limit was placed on the total force which the Black Sea Powers could send into the Mediterranean, a limit of 30,000 tons was created for the total forces of non-Black Sea Powers (globally, not individually) which could at any one time be in the Black Sea. Provision was made for increasing this limit up to 45,000 tons in the event of an increase in the strength of the strongest Black Sea fleet. Warships of non-Black Sea Powers could only remain twenty-one days in the Black Sea.

In time of war, Turkey not being belligerent, *neutral* warships were to have complete freedom of passage in the same conditions as in time of peace. On the other hand, *belligerent* warships were to be excluded altogether, whether belonging to Black Sea or non-Black Sea Powers, and were not to have any right of passage at all, save in the case of action under the Covenant, or of assistance given to a state the victim of aggression under a treaty of mutual assistance to which Turkey was a party, concluded within the framework of the League and registered and published as laid down by Article 18 of the Covenant. In that event, there were to be no restrictions on passage, or on the total forces which could be sent through in either direction.

In time of war, Turkey being belligerent, the passage of all warships was left entirely to the discretion of the Turkish Government.

Finally, a right was given to Turkey, if she should consider herself threatened by an imminent danger of war, to apply, pending a decision of the Council of the League, the last-mentioned régime, i.e. complete discretion to grant or refuse passage to any warship.

The demilitarization provisions were in effect abolished. This was not done in terms in the Convention, but by the process of substituting for the Lausanne Convention a new Convention which contained no provision for demilitarization.¹

II

It has been suggested in certain quarters that the Montreux Convention has had the effect of altering the balance of power in the Mediterranean, by allowing to Black Sea Powers rights of egress for warships which they did not formerly possess. The foregoing account will show that these suggestions are quite unfounded. The Montreux Convention has indeed *restricted* the rights in question, by imposing, on Black Sea as well as on non-Black Sea Powers, limitations on the conditions of passage which did not exist under Lausanne. The fact that there is no limit on the *total* force which a Black Sea Power can send into the Mediterranean, while, on the other hand, there is such a limit on the forces going into the Black Sea, is nothing new; for a precisely similar situation of principle existed under Lausanne. Only the details have been altered; and although the alteration is such as to impose in practice more severe limits on ingress into the Black Sea than previously existed, these are not regarded, by those competent to judge, as materially affecting the situation. Further, in one important respect the Montreux Convention imposes a new and severe restriction on Black Sea as well as on non-Black Sea Powers, in that passage in time of war, Turkey not being belligerent, is forbidden entirely to all belligerents save in the case of action under the Covenant or against an aggressor under a mutual assistance pact to which Turkey is a party.

¹ By a Protocol, however, Turkey was expressly authorized to refortify the Straits at once.

III

It is not possible to do more than indicate the general nature of some of the legal questions which arose in connexion with the Conference.

There was a preliminary question of some importance. The régime of the Straits, though varied from time to time, had for about a century previously been founded upon convention. The conventions in question were concluded between a limited number of Powers consisting mainly of the Great Powers. The régimes thus established were nevertheless applied by Turkey *vis-à-vis* all the world, and to the vessels of all countries. Countries not parties to the relevant conventions could, with the passage of time, be presumed to have accepted the régime in question, having made no objection to its application towards themselves. In the same way they might be regarded as having acquired a vested interest in such benefits as the régime might entail. In spite of this, the only countries summoned to the Montreux Conference were, very naturally, those who had signed the Lausanne Convention on which the existing régime was based. In these circumstances the question arose how far it was competent to a limited number of Powers to alter a régime which had received the tacit assent of all countries, and in which all countries, it might be argued, have an interest. On the one hand, it was obviously open to the parties to a convention to amend that convention or to substitute a new convention for it by agreement purely amongst themselves. On the other hand, such action in this case would affect the position of other countries who, though not actually parties to the convention establishing the régime concerned, might be regarded as having some sort of right and interest in regard thereto. This issue raised the whole question contained in the maxim "*pacta tertiis nec nocent nec prosunt*".

The view taken in practice was that, although it might be doubtful whether in these circumstances the parties to the Lausanne Convention would be competent to alter the whole basis and *principle* of the régime established at Lausanne, there was at any rate no reason why, so long as they preserved intact the basis and principle of that régime, they should not, by agreement purely between themselves, alter the details of its application. This in effect was all that was done at Montreux. The general principle of freedom of navigation and transit through the Straits for warships and commercial vessels, established for the first time in its entirety by the Lausanne Convention, was specifically preserved and reaffirmed by the Montreux Convention, and indeed given an unlimited duration. All that was altered was the incidence of that right and the detailed conditions under which navigation and transit were to be effected.

Another question, somewhat analogous to the one just mentioned, arose owing to the absence from the Conference of one of the parties to the Lausanne Convention, Italy. Although the Conference was called to make alterations in the existing régime, the form which these alterations were to take was to consist in the substitution of a new convention for that made at Lausanne. The question thus arose whether it was possible to do this except by the consent of all the Lausanne Powers, and in the absence of one of them. The view put forward by the United Kingdom Delegation was that, in so far as the work of the Conference consisted of abrogating or amending the Lausanne Convention or putting a new convention in its place, such action, *as such*, could not take place except with the consent of all the parties to the Lausanne Convention. Any other view would impinge upon the principle of the sanctity of treaties and encourage the alteration

or denunciation of treaties without due reference to the other parties concerned. In the view of the United Kingdom Delegation, therefore, the absence of Italy created this situation, that the other parties to the Lausanne Convention could at the most agree on a different régime with Turkey, which, so far as they were concerned, they would authorize Turkey to put into effect; and in consequence of this agreement they would not object if it was put into effect as against themselves. They could not, however, in the absence of Italy, abrogate the Lausanne Convention entirely, or prejudice the rights of Italy under that Convention, and these rights would remain intact.

The Turkish Delegation did not agree with this view, and put forward an argument which placed the matter on a somewhat different plane. They contended that the question of the Straits was to a large extent *sui generis*. The régime of the Straits, although for a long time past based on convention, and moreover on conventions made between a limited number of countries, had always in practice been applied *vis-à-vis* the whole world. A situation had become consecrated, therefore (and might be regarded as having the tacit consent, *a priori*, of all countries), under which Turkey, having made an agreement with a sufficient number of the principal interested Powers, became entitled to apply the agreed régime universally. The Turkish Government contended that the Lausanne Convention was not to be regarded as a treaty in the ordinary sense of the term, that is to say as a purely contractual arrangement between a number of states giving and receiving consideration. Rather it was to be regarded, as indeed were all the Straits conventions, as a species of general Act or Statute. Its nature was less that of a contract than of a piece of statute law, which once "passed", so to speak, became law universally and not merely for those who had laid it down. This being so, the Turkish Delegation contended that there was no absolute necessity for this new régime to be consented to by all the parties to the Convention establishing the old one. Once a sufficient number of directly interested Powers had, in conjunction with Turkey, authorized the new régime, Turkey became entitled to apply it universally.

The Turkish argument recalled various considerations which have from time to time arisen in connexion with the Berlin Act of 1885 setting up a general régime and statute for the Congo Basin. Those who are interested in the subject are referred to the judgment of the Permanent Court with regard to the Berlin Act in the *Oscar Chinn* case, Series A/B, No. 63, and in particular to the dissenting judgments of MM. van Eysinga and Schücking.

The theoretical point was never determined at the Conference. In practice, the Convention, in its preamble, purported to substitute itself for the Lausanne Convention; but this, of course, was open to the interpretation that such substitution was only effected as between those parties to the Lausanne Convention who actually became parties to the new Convention. Provision was made in the Convention whereby Italy could accede thereto if she wished.

A third question, of minor importance but worthy of mention, arose from the fact that there was on the one hand a general desire that the Convention should be subject to ratification, while on the other hand the Turkish Government wished to be able to bring it into force more or less immediately. Such action would, of course, have rendered the provision for ratification meaningless, since the ratification of a convention already in force would have no greater effect than that already produced by its signature. The difficulty was got over, from the technical point of view, by providing that the Convention should be ratified and

should not, *as an instrument*, come into force until it had received six ratifications, including Turkey's. At the same time it was provided in a Protocol that, as from a certain date in the near future, the Turkish Government should have the right to apply *provisionally*, not the Convention itself as such, but the régime provided for in the Convention. This procedure at once raises the question of what would happen if, the new régime having been applied provisionally in accordance with the Protocol, the necessary ratifications to the Convention were not made, so that juridically it never came into force. The fact of the matter is that such a procedure can only be adopted with safety in cases where it is a virtual certainty that the Convention in question will be duly ratified and will in due course come into force, as has occurred in the present case.¹

G. F.

THE JURIDICAL STATUS OF GERMAN REFUGEES

THE Assembly of the League of Nations in 1935 appointed an Expert Committee to report on the international assistance to refugees. The committee examined both the problems of the Nansen Office, which, according to the recommendation of an earlier Assembly, is to be liquidated in 1938, and the problems of the High Commission for Refugees from Germany, which, immediately after its creation by the Assembly of 1933, was detached from the League. The function of the High Commission for German Refugees was to negotiate and direct international collaboration relating to the economic, financial, and social problems resulting from the presence of the refugees in various countries. Mr. James G. MacDonald, the Commissioner, with his Governing Body composed of representatives of thirteen states under the chairmanship of Lord Cecil, sought to deal with the question of the juridical status of the refugees who no longer had valid German passports, and who were deprived of the protection of their state. The Governing Body adopted recommendations to the states concerned for the issue to such refugees of a document of "Identity and Travel" such as was proposed in 1927, for stateless persons, by a League Commission. Most of the Governments concerned agreed to the recommendations; but honoured them more in the breach than in the observance. The German refugees, like the Russians and the Armenians who were under the care of the Nansen Office, were continually harassed by the police because of their lack of regular papers.

The Expert Committee, which reported to the Council of the League in January 1936, recommended that the action for German refugees should be brought integrally within the League, and that the Council should appoint a High Commissioner to deal till the next Assembly with the juridical and other questions. His first duty was to prepare for a meeting of an Inter-Governmental Conference with a view to arranging a system of legal protection for the refugees. General Sir Neill Malcolm, who was appointed as the High Commissioner, convened the representatives of Governments at Geneva in July 1936, to consider an "Arrangement" to this end. Thirteen European countries, including Great

¹ The Turkish Delegation were also disposed to argue, on grounds analogous to those already noticed, that once the number of six ratifications specified in the Convention had been received, the Convention would come into force not only for the ratifying Powers but even for those Signatories who had not yet ratified it. In practice this point also was turned for the time being by the Protocol providing for the provisional application of the Conventional régime prior to the receipt of any ratifications.

Britain and the Irish Free State, and two South American states took part in the Conference; and it is notable that the United States was represented by an observer.

The basis of the "Arrangement" for the German refugees was found in the Convention of 1933 relating to the international status of the Nansen refugees; and a document of "Identity and Travel", similar in scope to the so-called Nansen Passport, was devised for those exiles who have not a valid German passport. The term "Refugee coming from Germany" is defined to cover any person who was settled in Germany and is not a foreign subject, and who in law or in fact does not enjoy the protection of the Government of the Reich. This covers those who are stateless, whether because they were so originally in Germany, or because they have been denationalized by decree of the German Government. The Contracting States agree to issue to refugees coming from Germany who lawfully reside in their territory an "Identity Certificate", which enables them to move about freely within the territory, and also to leave the country and return to it. The certificate is to be valid for one year; and the Contracting States agree normally to visa it for the purpose of admission to their territory. In order to meet the need of the many refugees whose position at the date of the "Arrangement" was not regularized in the country of refuge, it is provided that the certificate may be issued to such persons if they report to the authorities within a fixed time.

Another clause seeks to regulate the practice of expulsion of the refugees, which has been a grievous hardship in recent years. Those who have been authorized to reside in a country may not be subjected to expulsion unless for reasons of national security or of public order; and in any case they shall not be forced back to the German frontier unless they have been warned and have refused to make arrangements to proceed to another country, or to take advantage of arrangements made for them. The clause in form applies only for the benefit of refugees who have been authorized to reside in a country, and would not, therefore, cover those who are illicitly there. But it may be hoped that the spirit of the provision will be extended to these also.

Another section deals with the law covering the personal status of those refugees who have no nationality. It adopts the principles of the 1933 Convention, applying the law of the country of domicil, or, failing that, the law of the country of residence. Lastly, this section provides that refugees shall have ready access to the courts of law, and in the country of regular residence will enjoy the same rights and privileges as nationals and be exempt from prescriptions concerning security for costs.

The "Arrangement" has been ratified or adopted by several states, including Great Britain and France; and came into force in August 1936. It has undoubtedly ameliorated the juridical condition of the German refugees. There remain to be regulated the questions of social and economic conditions, which are covered by the 1933 Convention for the Russians and the Armenians. At the Assembly of 1936 the appointment of the High Commissioner for German refugees was renewed for two years, and his duties were defined to include the preparation for another Inter-Governmental Conference for the adoption of a Convention to embrace these matters. It is expected that the Conference will be held during 1937, and will draw up an instrument following closely the provisions of the earlier Convention. When these steps have been taken it should be possible to obtain the approval of the League for a single statute embodying the juridical

and other rights of all refugees, so as to secure for these stateless persons—the waifs and strays of international society—a minimum of the rights of man. It is impracticable to continue to deal piecemeal with a growing problem of the international society.

N. B.

EXTRADITION (FRANCE AND THE UNITED STATES)

THE Supreme Court of the United States rendered an important decision on November 9, 1936, in which it held that the President has no power to surrender a citizen of the United States to a foreign government under extradition proceedings, in the absence of a statute or treaty positively conferring upon him such power, and that a treaty stipulation expressly relieving the parties from an obligation to deliver up their own citizens does not confer on the President discretionary authority to surrender a citizen of the United States (*Valentine, Police Commissioner of New York City v. Neidecker Brothers*, 299 U.S. 5). The relators in this case were three brothers, American citizens who had been engaged in the business of banking in Paris, and who, having been charged with certain criminal transactions in connexion with the conduct of their business, escaped to the United States where upon request of the French authorities they were arrested and held for extradition under the treaty of 1909 between France and the United States. By Article 1 of the treaty the parties “mutually agree to deliver up persons who having been charged with or convicted of any of the crimes or offenses” mentioned in Article 2 and who “shall seek an asylum or be found within the territories of the other”. The acts with which the Neideckers were charged were admitted to have fallen within this category. By Article 5 of the treaty, however, it was provided that “neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention”. The petition of the Neideckers for writs of *habeas corpus* having been denied by the Federal District Court of New York, they appealed to the Federal Circuit Court, which reversed the order of the District Court and held that the treaty conferred no authority on the President to surrender them. This decision was affirmed by the Supreme Court in the present case. The Court asserted that it was a well-settled rule of American interpretation and practice that the President has no discretion to surrender an American citizen and that his authority must be clearly conferred by statute or treaty. It is not sufficient that the statute or treaty does not deny the authority; it must be expressly granted to the President and cannot result from implication. Since Article 5 of the treaty does not expressly create an obligation to deliver up “citizens” they are necessarily excepted from the category of “persons” which the parties agreed by Article 1 to surrender. The effect is therefore the same as if the treaty had provided that the parties “mutually agree to deliver up persons except their own citizens or subjects”. Special emphasis was placed on the fact that, whereas some of the extradition treaties of the United States while providing that neither of the parties should be bound to deliver up its own citizens added that they should have the power to do so in their discretion, the treaty of 1909 with France did not confer any such discretionary power. It followed therefore that the negotiators of the latter treaty must be presumed not to have intended to confer such authority on the President. The Court also relied upon the interpretation which Secretaries of State Fish, Freylinghuysen, Bayard, and Blaine had placed upon

Article 6 of the treaty of extradition of 1861 with Mexico which was identical with Article 5 of the treaty of 1909 with France. They had denied that the phrase "neither party shall be bound to deliver up its own citizens" conferred any discretionary authority to deliver them up. While their interpretation was not binding on the Supreme Court, the Court evidently attached great weight to it and apparently regarded it as a sound one. Apparently also the fact that it was the established policy of the French Government not to extradite its own nationals, and that it had in fact never done so, influenced the Court in reaching its decision.

In the opinion of the writer of this note the reasoning of the Supreme Court is far from convincing. In the first place, it is believed that the interpretation of the Department of State upon which it relied was erroneous and in any case it was not binding on the Court. In the second place, the only judicial authority which the Supreme Court was able to cite in support of its own view was the decision of a Federal district judge of Texas in 1891 (*ex parte McCabe*, 46 F. 363) which was based in the main upon Secretary Freylinghuysen's opinion and contained no substantial reasons in support of it. On the other hand, there was a contrary opinion of the Supreme Court of Mexico in the case of *Dominguez and Berrera* in 1879 which interpreted Article 6 of the treaty of extradition of 1861 with Mexico, which was identical with Article 5 of the treaty of 1909 with France, as authorizing the parties in their discretion to surrender their own citizens. A similar interpretation was adopted by the English Court of Queen's Bench in 1896 in the case of *Galvez* (1 Q.B. 230) as to the meaning of a similar provision in the Anglo-Belgian extradition treaty of 1876. In the present case the Supreme Court did not mention the decision of the Mexican Supreme Court, and the decision in the *Galvez* case was dismissed with the statement that it had a history and a background quite different from that of the present case and did not "present a persuasive analogy".

The argument that the treaty with France did not confer discretionary power on the United States to surrender an American citizen does not seem to the writer to be based on sound logic. By Article 1 the parties bound themselves to deliver up "persons" charged with or convicted of certain crimes. In the case of *Charlton v. Kelly* (229 U.S. 447) the Supreme Court had held in 1913 that the word "persons" as used in a similar clause in an extradition treaty with Italy embraced "citizens". Furthermore, it would seem that a treaty obligation to surrender a category of persons which the Court had held to embrace "citizens" would include the power to surrender any persons falling within that category. Article 5 does not take away that power; it merely makes its exercise discretionary. If a treaty expressly declares that the parties *are not bound* to surrender their own nationals it would seem to follow by necessary implication that they *may* surrender them if they choose to do so. To interpret Article 5 as denying to the President the power to do what Article 1 binds him to do destroys the treaty so far as it relates to the extradition of citizens.

As to the suggestion that, in view of the policy of France in refusing to surrender her nationals, it could hardly be presumed to have been the intention of the negotiators of the treaty of 1909 to confer on the President the power to surrender American citizens to France, it may be pointed out that it has not been the policy of the United States to insist upon reciprocity in the practice of extradition. The surrender of Charlton to Italy, a country which has consistently refused to surrender Italian nationals to the United States, is a well-known

example. The statement of Secretary of State Knox in the *Charlton* case that the United States did not regard reciprocity as essential was cited by the Supreme Court in that case in support of its conclusion that Charlton must be surrendered. It may also be pointed out that, while the French Government has refused to surrender its nationals to the United States, it tries them in its own courts and punishes them when they are found guilty. The trial and conviction by a French court in 1926 of one Mourey for robbery in New York and his imprisonment for life is a case well known to Americans. In the present case the refusal to extradite the Neidecker brothers confers immunity upon them, since under the American theory of jurisdiction they cannot be tried in the United States for crimes committed abroad.

In the Circuit Court there was a strong dissenting opinion by Judge Manton, who characterized the arguments of the majority as "false" and out of harmony with the "true principles of international law". In our opinion there should be common effort and co-operation among the nations for the repression and punishment of crime, and it is regrettable that the courts of justice should feel obliged to adopt an interpretation of extradition treaties so narrow as greatly to impair their utility as instrumentalities for the promotion of so desirable an object.

In the present case the Supreme Court expressed regret that its decision would leave no way open by which the accused could be brought to trial and their guilt or innocence judicially determined. The remedy, it added, lay with the legislative or treaty-making authorities which alone had the power to provide for the extradition of American citizens. It is submitted, however, that the Court might, instead of adopting the strict interpretation which it did, have adopted the view that if it had been the intention of the negotiators of the treaty of 1909, while relieving the parties of an obligation to surrender their own citizens, to deny them the power to do so, they would have employed language which indicated such an intention. This was the view adopted by the Supreme Court of Mexico in the case referred to above and by the Swiss Federal Tribunal in the case of Piquet, a Swiss national who was surrendered to the United States in 1890 (Moore, *Digest of International Law*, Vol. IV, p. 298). In our opinion it was a reasonable view, and if it had been adopted by the American Supreme Court it would have saved the United States from being made an asylum for Americans charged with having committed crimes abroad.

JAMES W. GARNER.

SOVEREIGN STATES AS PLAINTIFFS (COUNTER-CLAIMS)

IN *United States v. National City Bank of New York et al.* (83 F., 2nd, 236), the Federal Circuit Court of Appeals (2nd Circuit) rendered a decision on April 6, 1936, in which it held that when the United States brings an action as a plaintiff in a court it is subject to the jurisdiction of the court in respect of a set-off or direct counter-claim on the part of the defendant. In this case the United States as the assignee of Russia under the agreement of November 16, 1933, by which Russia assigned to the United States all sums due to the U.S.S.R. as the successor of prior governments of Russia, from American nationals, companies, corporations, &c.—which agreement was one of the conditions under which the United States recognized the Soviet Government (*Amer. Jour. of Int. Law, Off. Docs.*, Vol. XXVIII, p. 10)—brought suit to compel payment to it of certain funds held by the defendant bank, which funds previously belonged to Russia. The

bank claimed a set-off against the amount sued for by the United States, to cover certain claims which it had against Russia, which claims arose out of the same transaction.

In upholding its jurisdiction in respect of the counter-claim the Court said: "if a sovereign state goes into court seeking its assistance, it is in accord with the best principles of modern law that it should be obliged to submit to the jurisdiction in respect to a set-off or counter-claim assertable as a defense in a similar suit between private litigants. . . . Where a sovereign voluntarily litigates, he must play the rôle of a litigant like any other suitor and abide by the consequences. . . . It is now established that, where a sovereign comes into court, he is unarmed with immunity as against the rights of a defendant who has a proper set-off to his claim."

So far as *direct* counter-claims are concerned, that is, those which arise out of the facts or transactions upon which the plaintiff's claim is based, this decision is in accord with the general jurisprudence of American courts. See especially *Kingdom of Norway v. Federal Sugar Refining Company*, 286 Fed. 188 (1923). But there are contrary opinions where an attempt is made to compel or adjudge a sovereign to pay money. *French Republic v. Inland Navigation Company*, 263 Fed. 410 (1920). Likewise the decision is in accord with English jurisprudence: see *The Newbattle*, L.R. 10, P.D., p. 35 (1885). But if the counter-claim is an *indirect* one, that is, one arising out of facts or transactions extrinsic to those upon which the plaintiff's claim is based, the courts have generally held that they have no jurisdiction in respect of such claims. *Kingdom of Roumania v. Guaranty Trust Co. of New York*, 250 Fed. 341 (1918); *South African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord*, 77 L.T. Rep. 555 (1898); and *Union of Soviet Republics v. Belaiew*, 134 L.T. Rep. 64 (1925). See also the opinion of the Permanent Court of International Justice in the case concerning the Factory at Chorzów, *Publications of the Court*, Series A, No. 17, pp. 60 ff.

JAMES W. GARNER.

CONFISCATORY DECREES OF THE SOVIET GOVERNMENT OF RUSSIA —VALIDITY IN UNITED STATES

In the case of *United States v. Belmont* (85 Fed. 542) the Federal Circuit Court of Appeals (2nd Circuit) rendered a decision on August 10, 1936, holding that it was not bound to give effect to decrees of the Soviet Government of Russia which purported to confiscate Russian-owned property located in the United States. In this case the United States as assignee under the agreement of November 16, 1933, by which it recognized the Soviet Government, of all sums of money due to the Russian Government from American nationals, corporations, companies, &c., brought suit against the defendant for payment of a sum deposited with him prior to 1918 by a Russian corporation known as the Petrograd Metal Works. The Soviet Government by a decree of June 28, 1918, had confiscated the property of the corporation, including its deposit with the defendant in New York which it was contended by the United States was assigned to it by the agreement of November 16, 1933. The defendant argued that the agreement included only claims owed directly to the Russian Government and not claims acquired through confiscation of the property of Russian nationals. The Court, however, sustained the contention of the United States on this point. Distinguishing between the duty of the Court to give effect to Russian decrees confiscating property located in Russia and its duty to give effect to decrees confiscating

property located in the United States, such as the account involved in the present case, the Court said:

“With respect to property physically located within Russian territory there can be no doubt that the decree of confiscation was effective to transfer title, and that after recognition of the Soviet Government by the executive branch of our own Government, the courts of this country must enforce titles and rights valid according to Russian law with respect to such property. . . . But the doctrine is otherwise with respect to property outside its own territory, which a foreign state attempts to confiscate. Laws of foreign governments have extra-territorial effect only by comity, and the public policy of the former determines whether its courts will give effect to foreign legislation. It is very clear that it is contrary to the public policy of the State of New York to enforce confiscatory decrees with respect to property located here at the date of the decree.”

To the argument that recognition of the U.S.S.R. by the United States, acceptance by it of the assignment, and bringing by it of this suit all indicated that the public policy of the United States was not opposed to enforcement of the confiscatory decree, the Court replied:

“Recognition permits Russia to resort to our courts and have its rights judged by the same principles as apply to other litigants. It expresses no policy as to what those principles are. Nor can the assignment and the bringing of suit give the assignee any greater right than the assignor had. . . . Confiscation of property within the United States is precluded by the Fifth Amendment to the Constitution. . . . If the public policy of the United States is material, it would seem clearly adverse to a claim based on the Russian decree. But in our opinion it is the policy of New York which this Court is to apply. The question is whether the plaintiff's assignor had an enforceable right as successor to the Russian corporation after its nationalization. That is really a question of title, and state law, not federal law, governs the matter of title.”

This decision is not inconsistent with the holdings of the English Courts in *Luther v. James Sagor & Co.*, [1921] 3 K.B. 532, and *Princess Paley Olga v. Weisz*, [1929] 1 K.B. 718, regarding their duty to give effect to Russian confiscatory decrees, since in those cases the property confiscated was located in Russia, not in England.

JAMES W. GARNER.

SPANISH CIVIL WAR—NEUTRALITY POLICY OF THE UNITED STATES

ON August 7, 1936, the Assistant Secretary of State of the United States informed all American consular representatives in Spain that “in conformity with its well established policy of non-interference with internal affairs in other countries, either in time of peace or in the event of civil strife, this government will, of course, scrupulously refrain from any interference whatsoever in the unfortunate Spanish situation”. (Text in *New York Times*, August 23, 1936.)

Under the recent neutrality legislation of the United States, however, the President had no authority to place an embargo on the exportation of munitions and implements of war to Spain for the use of either side, since by its own terms the Neutrality Act applies only to international wars and not to civil wars. Nevertheless, the government employed strong moral pressure to prevent American manufacturers and exporters from shipping such articles to Spain and until the end of the year 1936 this pressure was successful, no licences having been issued by the Federal Munitions Control Board for this purpose and none in fact having been sought. But towards the end of December 1936 the Robert Cuse

Company of Jersey City applied to the Board for a licence to export to the loyalist government of Spain \$2,777,000 worth of airplanes and engines. Since the Neutrality Act had no application in the case of civil wars the Munitions Control Board, which had refused to issue licences for the exportation of arms and munitions to Italy and Ethiopia during the war between those countries, was without authority to refuse licences for the shipment of such articles to Spain. With evident regret, therefore, the Board felt obliged to issue the licences in the present case, and it did so. The President publicly expressed his disapproval of the action of the Cuse Company in refusing to comply with the government's non-intervention policy, although he admitted that the company was within its legal rights in shipping the airplanes and engines to the Spanish Government. At the same time he caused the various governments of Europe most directly concerned to be informed of his sincere regrets and of the intention of the Government of the United States to continue to pursue a policy of strict neutrality in the present civil war. Early in January 1937 Congress hastily passed a resolution extending the terms of the existing neutrality law so as to make it applicable to the Spanish civil war. While it was too late to prevent the shipment referred to above, it came early enough to stop a large shipment consigned to the Spanish Ambassador to Mexico, which was intended to be forwarded to Spain. Incidentally this affair illustrates the objection to a strait-jacket legislative neutrality policy and the desirability of a wider executive discretion such as was emphasized by the Supreme Court in its recent decision in the Embargo Case.

The government of the United States in August 1936 had occasion to make a pronouncement concerning its position in regard to the blockade of certain rebel ports, announced by the loyalist government of Spain on August 20. On August 25 Mr. Wendelin, in charge of the American embassy at Madrid, was instructed to inform the Spanish Government that the Government of the United States could not admit "the legality of any action on the part of the Spanish Government in declaring such ports closed unless that government declares and maintains an effective blockade of such ports". The instruction added that in taking this position the Government of the United States was "guided by a long line of precedents in international law with which the Spanish Government is familiar" (Text in *New York Times*, August 27, 1936). This is, of course, the rule laid down by the Declaration of Paris of 1856, and while the United States has never formally adhered to that instrument it has uniformly acted in accordance with the rule. In fact during the Don Carlos insurrection in Spain in 1834 the Spanish Government was informed by the Government of the United States that it could not acknowledge the legality of any blockade which was not maintained by a force competent to "sustain" it (Moore, *Digest of International Law*, Vol. VII, p. 803). Similar pronouncements have been made by the Government of the United States on other occasions. In the present case the Secretary of State did not deny the effectiveness of the Spanish blockade, but, evidently being in doubt as to whether the Spanish Government had sufficient naval forces with which to maintain an effective blockade, he wished to serve notice on it that the United States would not recognize its validity unless it were an effective one.

JAMES W. GARNER.

LAW OF WAR

CONVERSION OF MERCHANTMAN INTO WAR-VESSEL

The "Ayesha" at Padang, November 27, 1914

So rare are cases of international recognition of merchantman converted into war-vessel that the treatment of the *Ayesha* at Padang on November 27, 1914, has given rise to divergent interpretations in German and Dutch text-books on international law; the former treating her as a converted merchantman, the latter as a prize of war.

The relevant facts were as follows:

The Dutch Neutrality Regulations of August 5, 1914, which were in force in Sumatra during the visit of the *Ayesha* to Padang, were based on The Hague Convention on neutral rights and duties in maritime war (No. 12 of 1907) which had been ratified both by Germany and Holland at the outbreak of the War 1914-18.

By Art. 4 "belligerent war vessels and vessels assimilated thereto" were forbidden to enter any port of the realm at home or abroad; but by way of exception they were allowed under Art. 5 to enter "a colonial port or roadstead for the sole purpose of completing their stores of consumable goods or fuel". If permitted to enter they must depart when the reason for entry had ceased to exist and in no case must their stay exceed 24 hours from the hour of arrival. Prizes of war, on the other hand, were excluded from all ports except in cases of unseaworthiness, stress of weather, or want of fuel or provisions (Art. 10).

Conversion alleged.

On November 9, 1914, the German cruiser *Emden* arrived off Cocos-Keeling Island and dispatched a landing-party of Kapitän Leutnant Hellmuth von Mücke, two officers and 50 ratings, in two cutters, each armed with two machine-guns with instructions to destroy the British Cable Station. During the operations the *Emden* sighted H.M.A.S. *Sydney* and abruptly put to sea to engage the enemy, leaving the landing-party to fend for itself.

Leutnant von Mücke seized the *Ayesha*, a three-masted schooner of 97 tons belonging to the Governor and used by him for conveying copra to the Netherlands Indies. This vessel, which was on the British register, was primarily a trading-vessel, with accommodation for the owner and a crew of five. The Germans made her ready for sea, shipped the four machine-guns and embarked upon her. Von Mücke in a brief address declared that the vessel was now His Imperial Majesty's ship *Ayesha*, hoisted the German war-flag, and put to sea.

Off Padang on the west coast of Sumatra which was reached on November 26, the vessel was shadowed for some time by the Netherlands torpedo-boat *Lynx*, which von Mücke eventually boarded in order to ascertain whether she would be allowed to enter the harbour.

According to the version given in his book *The Ayesha* (English translation by R. H. Lockhart, London, 1930), the commander of the *Lynx* saw no objection to his entering the port but held out internment as a prize of war for the duration of the War as his probable fate. Von Mücke, on the contrary, maintained that his vessel was a war-ship, offering his word of honour as commander for its public character. Deciding to bluff, he entered the roadstead under a native pilot, disregarded the orders of the harbour-master (a Belgian), and anchored near

certain German steamers already in refuge in the harbour, amid cheers from their crews.

When asked to produce (1) evidence of his right to fly the German war-flag, and (2) a regular commission appointing him to the command, he declined the latter request on the ground that he was responsible only to his own superiors, and, as to the first, offered his word of honour as commander.

He maintains that the civil authorities at Batavia when consulted by telegram waived further evidence of public character, and granted the permission required by the Dutch regulations for the sale of water and provisions to the *Ayesha*, but refused it for marine charts and clothing, as those articles would "add to her fighting force" in violation of Article 19 of The Hague Neutrality Convention.

He put to sea within 24 hours of the hour of arrival. Incidentally it may be mentioned that a fortnight later while still in Netherlands East Indian waters he fell in, but without previous arrangement, with the small German fleet auxiliary N.D.L. steamer *Choising* which had been lying in Padang with a cargo of (bad) Indian coal awaiting a signal from the *Emden*. To the *Choising* von Mücke transferred his ship's company and assumed command. The *Ayesha* he scuttled (with regret, since she had been their (uncomfortable) home for six weeks on a voyage of 1,709 miles) and he continued his voyage, which ended at Hodeida on the Turkish side of the Red Sea on January 8, 1915. After further adventures ashore he made his way to Constantinople.

This incident at Padang appears in certain German text-books as an example of successful conversion of merchantman to war-vessel in compliance with The Hague Convention of 1907: see Strupp's *Wörterbuch des Völkerrechts*, Vol. I, p. 102 (1924), and Ernst Vanselow, *Völkerrecht*, p. 256, n. 174 (1931),¹ where it is *inter alia* said: "He [von Mücke] successfully insisted on recognition as a ship of war and was allowed to leave. As 'prize of war' the vessel would have been detained as she had not entered under *force majeure*."

In Holland, however, the *Ayesha* is deemed to have been treated at Padang as a prize of war, as the following citations show.²

The official account of the Dutch authorities regarding the *Ayesha* during her stay in the port of Padang may be learnt from the *Oranjeboek* of October 1915, p. 32. The passage referring to the *Ayesha* reads as follows:

"The Dutch authorities took the view that as the commander of the *Ayesha* was unable to produce a commission issued by the competent German authority, the vessel must be treated as a prize of war in conformity with Art. 10 of the Dutch Neutrality Regulations.

Conformably with the terms of Art. 10 the *Ayesha* was furnished only with such articles as were strictly necessary to meet her unseaworthiness and lack of provisions. The *Ayesha* thereafter departed from the roadstead on November 28th and did not return to Dutch-Indian territorial waters. Manifestly great care had to be taken to prevent the schooner from obtaining war-supplies or equipment by other means during her sojourn in these waters."

¹ If the author, who is described in the preface as Kapitän zur See a.D. as well as Dr. juris, is the "Vanselow" who, as naval member of the German Armistice Delegation, signed the Armistice of November 11, 1918, he would seem to have followed the example of Captain Semmes of the *Alabama*, who, after the fall of the Confederacy, made a second name for himself as a maritime lawyer in Mobile, Ala.

² For these citations I am indebted to the International Intermediary Institute of 6 Orange Street, The Hague.

To the same effect F. Bauduin, who commanded the Dutch East Indies squadron in the East Indies, in his book *Het Nederlandsch Eskader in Oost-Indie*, 1914-16, p. 69 :

"On the 25th November the *Lynx* had sighted the *Ayesha* and kept her under observation. In order that nothing might be done or communicated without orders from Batavia, the commander of the *Lynx* was ordered to follow the vessel at a great distance and to hold no communication until orders had been received. These came eventually, although the commander of the *Ayesha* had meanwhile gone on board the *Lynx* to inquire whether he might enter Padang and how he would be treated there. The *Ayesha* had hoisted the German war-flag and the commander maintained that she was a ship of war. He forgot, however, that in terms of the international convention it is also requisite that the commander should have been duly commissioned by the competent authority. The commander of the *Lynx* was only able to give him evasive answers and on the 27th the *Ayesha* entered Emmahaven. . . .

The ship was deemed to be a prize of war under a prize-crew notwithstanding the protest of her commanding officer. Permission was granted for her taking in provisions and water as well for procuring sail-cloth and rope in order to make her seaworthy. Everything else was refused, such as engaging a doctor, since the requests had they been granted would have contributed to equipping the vessel for a task for which she had not been intended and would have conflicted with our neutrality obligations. The commander would not hear of internment, so that he was obliged to depart within 24 hours and he left the roadstead in the evening of the 28th, bound, as he said, for German East Africa."

The Dutch internationalist professor, Dr. J. P. A. François, of the Commercial University, Rotterdam, and "Referendar" to the Netherlands F.O., in his *Handboek van het Volkenrecht*, Vol. II, Zwolle, 1933, deals with the case of the *Ayesha* on p. 339 as a case of conversion of a merchantman into an "auxiliary cruiser". He says:

"The Netherlands-Indian Government refused to regard as an auxiliary cruiser the schooner *Ayesha*, which was manned by a surviving part of the crew of the destroyed German *Emden* and entered Padang on the 27th November 1914, for the reason that her commander was unable to produce evidence that he had been 'dûment commissionné par les autorités compétentes' (Art. 2 of The Hague Convention on the Conversion of Merchantmen into War-vessels); the vessel was treated as a prize of war under a prize-crew."

In a note the author refutes the opinion of Vanselow, p. 256:

"Incorrect Vanselow p. 256 note, who maintains that the vessel 'seine Anerkennung als Kriegsschiff durchsetzte'."

The *Ayesha* is again mentioned on p. 531 of François's book, this time in connexion with a prize.

"For prizes of war under prize-crews the Dutch Neutrality Regulations had not laid down expressly the measure of stores which could be legitimately supplied. The schooner *Ayesha* which entered Padang on Nov. 27th and was regarded by the Dutch East Indian Government as a prize of war under a German prize-crew (see above, p. 339) was supplied with those articles 'requisite to meet her condition of unseaworthiness and lack of provisions'; the question of coal not arising in the case of a sailing-vessel."

Jacques Luchaire, *Droits de séjour et d'action des navires belligérants dans les eaux territoriales neutres*, Caen, 1933, dealing with the application of The Hague Convention of 1907 (*asile et séjour dans les eaux neutres*), writes:

"Holland and the Scandinavian countries, by reason of their proximity to the theatre of war, adopted a stricter attitude and declared their ports closed to belligerent ships

of war. The 24 hours' rule was admitted for the departure of belligerent vessels in port at the moment of declaration of war. The Dutch Regulations did not apply to oversea possessions, but sojourn was limited to 24 hours. This was the régime applied to the *Ayesha* and the survivors of the *Emden*."

A. H. CHARTERIS.

INSTITUT DE DROIT INTERNATIONAL

THE meeting of the Institut, held at Brussels in April 1936, was recorded in the last number of this *Year Book*. The Institut meets again at the end of August 1937 at Luxemburg.

INTERNATIONAL LAW ASSOCIATION

THE Association held its 39th Conference in the Cour de Cassation, Paris, from the 10th to the 15th of September 1936, under the presidency of Professor de Lapradelle.

It was expected that the troubled state of the world and the fact that the courts were not in session would restrict the numbers of members in attendance, and this proved to be the case, but 139 members were present and 44 visitors, the members coming from as many as 22 states, the larger numbers being from Germany, France, Great Britain, and The Netherlands.

According to custom the Council met at the beginning and end of the Conference, when several new members were elected.

At the Inaugural Meeting the chair was taken by M. Richard as representative of the Garde des Sceaux. The Report of the Executive Council and the revised Constitution, including the Standing Orders, were adopted; on his election Professor de Lapradelle addressed words of welcome which were answered by Dr. Walter Simons, Dr. E. von Hofmannsthal, M. Xavier Janne, MM. Campbell Lee, R. E. L. Vaughan Williams, Dr. J. A. van Hamel, and Judge Namitkiewicz.

In the course of the subsequent sessions a Report on Nationality of Origin was presented by Mlle Delage, and one on the Nationality of Companies by Maître Marcel de Gallaix, each in representation of the French Branch, and these were followed by a Report of the Committee on Commercial Arbitration, presented by Mr. R. S. Fraser, which was approved. On the third day the discussion (adjourned from Budapest) on international courts of Private Civil Law (Tribunaux Mixtes de Droit Privé), was resumed on a Report presented by Maître P. O. Lapie; this was succeeded in the afternoon by the resumed discussion on Payments in Gold, which was again adjourned, a fresh Report being presented by Maître A. Prud'homme on behalf of the French Branch.

The Committee on Conciliation between Nations presented its Report on the fourth day, the propositions on the Right of Defence giving rise to a variety of opinions. A substantive Declaration was adopted, directed to invoking speedily the jurisdiction of the Permanent Court in the case of any violation of the Pact of Paris. The Report on the Law of Insolvency, presented on behalf of the Swiss Branch, raised a large amount of interest, but the ensuing discussion proved that the importance and complication of the subject necessitated further consideration. The last subject was the Law of Trade Marks, being another link between the International Convention of 1934 for the Protection of Industrial Property and the expected amending Agreement.

The last day was taken up by a discussion on the Report presented by M. de Lapradelle on the Protection of Civil Populations from Engines of War. The Closing Session was honoured by the chairmanship of M. Matter, Président de la Cour de Cassation.

It must be mentioned that certain Resolutions of substance were subsequently disallowed by the Executive Council on the ground of absence of notice.

The generous hospitality offered to the Association included receptions at the Foreign Office (where the guests were received by M. Pierre Viénot, Sous-Secrétaire d'État), at the Hôtel de Ville, and at the Louvre, specially floodlit for the occasion, an expedition to Chantilly followed by a dinner given by M. and Mme Witenberg to the Members of the Council, and a dinner at the Cercle Interallié given by the French Branch of the Association.

GROTIUS SOCIETY

THE 22nd volume of the *Transactions of the Grotius Society* contains the papers read before the Society during 1936. "The Outlook for the Law of War" was treated by Prof. J. W. Garner; "Some Legislative and Administrative Aspects of the Application of Article XVI of The Covenant" by Prof. Phillips Bradley; "The Nature of International Law" by Prof. A. L. Goodhart; "The Significance for International Law of the Tripartite Character of the International Labour Organization" by C. Wilfred Jenks; "Comparative Law in relation to International Law" by Prof. Avv. Mario Sarfatti; "The New Russian Constitution" by Dr. Samuel Dobrin; "An Historical Survey of the Application of Sanctions" by Dr. George Fiédorowicz; "La Guerre aérienne et la Population Civile" by Prof. A. de G. de Lapradelle; with a paper presented by Baron M. von Redlich on "A Résumé of the Movement for World Peace".

The President for the year was The Right Honourable Lord Alness, P.C.

DECISIONS, OPINIONS, AND AWARDS OF INTERNATIONAL TRIBUNALS

JUDGMENT OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE

JUDGMENT DELIVERED DECEMBER 16, 1936¹

The Pajzs, Csaky, Esterhazy Case

THIS case was brought before the Permanent Court of International Justice by the Hungarian Government against the Government of Yugoslavia. It was instituted by an application, filed by the Hungarian Government, based upon Article X of Agreement II signed in Paris on April 28, 1930, or, alternatively, upon Article XVII of that Agreement and Article XXII of Agreement III of the same date.

The origin of the case is to be found in the agrarian reform instituted by the states of the Little Entente, and its application to Hungarian nationals at the end of the Great War. As is well known, the Roumanian agrarian reform legislation led to the so-called Hungarian Optants dispute, with which the League of Nations was occupied for a prolonged period, but neither that dispute nor the difficulties arising between Hungary and the other states of the Little Entente had been settled when the matter was taken up by the Hague Reparations Conference of 1929-30. As a result of this Conference, four Agreements "relating to the obligations resulting from the Treaty of Trianon" were signed in Paris on April 28, 1930. Broadly speaking, the controversy was settled by the creation of an "Agrarian Fund", to which France, Great Britain, and Italy agreed to contribute, out of which, without prejudice to the legal contentions on either side, compensation to the expropriated Hungarian landowners was to be paid. This being the general system, the Agreements laid down a number of detailed terms and conditions, upon the precise effect of which the decision in the case now before the Court turned.

It is to be observed that although various measures of "agrarian reform" had been applied to the large Hungarian estates in Yugoslavia from 1919 onwards, no definitive law of agrarian reform had been promulgated at the date of the Paris Agreements. Agreement II provided that the definitive law should be promulgated before July 20, 1931. It was accordingly promulgated on June 26, 1931. It contained the following provisions:

"3. With regard to the expropriation of large landowners of Hungarian nationality, to whom apply the provisions of the law of May 27th, 1930, concerning the application of the Agreements, particularly of the obligations resulting from the Treaty of Trianon, &c., between Hungary and the victorious Powers, the following action will be taken: in accordance with the provisions of the above-mentioned law, the whole of the estate will be expropriated forthwith for the purposes of the agrarian reform and will be transferred to the State and registered. Then the maximum areas prescribed by the provisions of the present law will be restored in full and entire possession to the owners, and their names will be entered in the land registers.

¹ Series A/B, No. 68. The Court's publications can be obtained from the English agents: Allen & Unwin Ltd., 40 Museum Street, London, W.C. 1.

"4. The indemnities for the expropriation of these estates being paid by the State into Fund A, the agriculturists to whom these expropriated lands have been ceded will pay to the State the sums which they would otherwise pay, under the present law, as purchase money."

Among the Hungarian nationals owning land in Yugoslavia and affected by the measures of agrarian reform prior to the promulgation of the "definitive law", were the petitioners (*Pajzs*, *Csaky*, and *Esterhazy*) in the three cases in which the Hungaro-Yugoslav Mixed Arbitral Tribunal rendered the judgments forming the subject of the present proceedings.

The three petitioners, on December 21, 22, and 28, 1931, instituted cases before the Mixed Arbitral Tribunal against the Agrarian Fund created by the Paris Agreements, asking for judgment against the Fund for an indemnity, the amount of which was specified, in respect of their lands which had been "taken", "seized", or "expropriated"; they also presented certain minor claims. The expropriation decisions referred to in Article II of the "definitive law" were not taken until May and June, 1932, in respect of these estates; the decisions were notified to the interested parties in December of that year. In the words of these decisions, "the indemnity . . . is to be paid by the Kingdom of Yugoslavia . . . to the Agrarian Fund which will pay this indemnity" to the interested parties; the latter are informed that they "may . . . submit their application to the Mixed Arbitral Tribunal" within a certain limit of time after receipt of the notification. As stated above, the applications had, in fact, been lodged before the decisions in question had been notified. These proceedings culminated in judgments rendered by the Mixed Arbitral Tribunal on April 21, 1933; by these judgments the Tribunal—save with regard to a piece of land belonging to one of the petitioners in respect of which an agrarian reform measure was applied for the first time under the definitive law—declared the applications out of time and dismissed the petitioners' claims.

The latter, therefore, on June 15, October 18, and October 19, 1933, instituted fresh proceedings before the Mixed Arbitral Tribunal, this time against Yugoslavia as defendant. The three applications, while stating that the actions were the outcome of the measures of expropriation for the purposes of agrarian reform which had been applied to the estates in question, invoked Article 250 of the Treaty of Trianon in asking for judgment against Yugoslavia for an indemnity in respect of these estates payable to the petitioners. In two of the applications (*Pajzs* and *Csaky* cases) it is stated that in the intention of the petitioners the indemnity sought is the so-called "local indemnity" which Yugoslavia pays to her own nationals owning large estates expropriated under the agrarian reform. The petitioner *Esterhazy*, while stating that "his case does not fall under the Paris Agreements", asked for an indemnity, the amount of which he calculated on the basis of Article X of Agreement III. The three petitioners invoked the dismissal of their previous applications by the Mixed Arbitral Tribunal; one of them also stated that, since then, he had applied direct to the Yugoslav Government for an indemnity, but that his claim had remained unanswered. To these applications the Yugoslav Government lodged a preliminary objection, praying the Tribunal to adjudge that the applications could not be entertained. On July 22, 1935, the Mixed Arbitral Tribunal delivered judgment in these three cases, declaring that the applications could not be entertained "because they are based on Article 250 of the Treaty of Trianon". These are the judgments appealed from.

The grounds on which all three of these decisions were based may be summarized as follows:

According to the Mixed Arbitral Tribunal: (a) the subject of the petitioner's complaint is the refusal of an indemnity after an expropriation effected in application of the legislation relating to the agrarian reform; accordingly the case is one "in regard to the agrarian reform" within the meaning of Article I of Agreement II; (b) in that article it is provided that in all the cases enumerated therein Yugoslavia is relieved of all responsibility; (c) it is provided in Article VII of Agreement II that "in the legal proceedings referred to in Article I, the Mixed Arbitral Tribunals shall not be competent . . . to interpret Article 250 of the Treaty of Trianon"; (d) "the arrangement set forth in Agreement II" is effective only if it covers all cases which have been or may be brought by Hungarian nationals against Yugoslavia in regard to the agrarian reform; Article I of Agreement II covers them all—whether pending or future—and none of these cases may henceforth be based on Article 250 of the Treaty of Trianon.

On December 6, 1935, the application of the Hungarian Government instituting the proceedings before the Permanent Court of International Justice was filed.

The first point to be considered was whether the Court could entertain the appeal of the Hungarian Government from the three judgments of the Mixed Arbitral Tribunal dated July 22, 1935.

According to Article X of Agreement II,

"Czechoslovakia, Yugoslavia and Roumania, of the one part, and Hungary, of the other part, agree to recognize, without any special agreement, a right of appeal to the Permanent Court of International Justice from all judgments on questions of jurisdiction or merits which may be given henceforth by the Mixed Arbitral Tribunals in all proceedings other than those referred to in Article I of the present Agreement."

The right of appeal therefore depends upon three conditions: (1) the judgment must have been rendered subsequently to the Paris Agreements; (2) it must be on a question of jurisdiction or merits; (3) it must have been rendered in a case other than those referred to in Article I of Agreement II.

No question arose as to condition (1), and the Court held that condition (2) also was clearly fulfilled. The real issue was condition (3).

As to this, the Court stated that it must examine these suits, not only from the point of view of the form of the applications to the Mixed Arbitral Tribunal, but also and more especially from the point of view of their substance.

Article I of Agreement II provides (so far as material) as follows:

"As from the date on which the present Agreement comes into force, the responsibility of the defendant in all legal proceedings brought prior to January 20th, 1930, by Hungarian nationals before the Mixed Arbitral Tribunals, against Czechoslovakia, Yugoslavia and Roumania, in regard to the agrarian reforms, shall be solely incumbent upon a fund to be called the 'Agrarian Fund'."

"1. (This paragraph relates solely to Roumania.)

"2. The same rule shall apply to any legal proceedings which Hungarian nationals may later institute before the Mixed Arbitral Tribunals, in regard to the agrarian reform, against Yugoslavia, in which country the agrarian reform has not yet formed the subject of a definitive law, on account of properties which, by virtue of the laws and decrees in force, are already subject to the agrarian reform and in regard to which the owner's right of free disposal has been limited prior to January 20th, 1930, by the effective application to his property of the provisions of those laws and decrees.

"It is understood that any proceedings which may be instituted in respect of properties referred to in the first paragraph and paragraph 2 of the present Article, as a result of the application of the new Yugoslav law finally settling the matter in which the said properties are to be dealt with, can only be instituted against the Agrarian Fund, Yugoslavia being relieved of all responsibility.

"In this connection, it has been agreed that Yugoslavia shall promulgate the definitive law before July 20th, 1931, and shall take the necessary action to ensure that the new legislative provisions are applied to the properties referred to above as rapidly as possible and in any case before December 31, 1933."

The Court observed that the only clause in Article I which describes the characteristics of the proceedings in question is the first sub-paragraph of paragraph 2. Further, it was no less important to note that no reference whatever is made to the actual indemnity which may be claimed by a petitioner in his suit. Sub-paragraph 2 of paragraph 2, while applying the principle of the responsibility of the Agrarian Fund laid down by the general clause at the beginning of the article, does no more than state against whom the proceedings described above are to be instituted, when they are instituted as a result of the application of the new Yugoslav law finally settling the manner in which the properties in question are to be dealt with. Sub-paragraph 3 only fixes the time-limits allowed to Yugoslavia in connexion with her new law.

The Court therefore held that characteristics of the suits so contemplated are limited to the following: they must be suits brought (a) by Hungarian nationals; (b) after January 20, 1930; (c) in regard to the agrarian reform in Yugoslavia; (d) before the Mixed Arbitral Tribunals; (e) in respect of properties which are already, by virtue of the laws and decrees in force, subject to the agrarian reform and in regard to which the owner's right of free disposal has been limited by the effective application to his property prior to January 20, 1930, of the provisions of those laws and decrees.

It was not disputed that the three suits were brought by Hungarian nationals; that they were brought in June and October 1933, i.e. after January 20, 1930; and that they were brought before the Mixed Arbitral Tribunal.

In the Court's opinion, an examination of the applications submitted to the Mixed Arbitral Tribunal showed that they satisfied the two other considerations prescribed by Article I, paragraph 2. The three suits were undoubtedly instituted in regard to the agrarian reform and on account of properties which, on January 20, 1930, had already fallen under the agrarian reform and had for that reason been subjected to the measures of expropriation specified in Article I. Nevertheless, the Hungarian Government maintained that the three suits had not thereby become legal proceedings within the meaning of the article.

It has been shown (the Court stated) that the three suits in question had been instituted in these particular circumstances—that is to say, the petitioners had already, in accordance with paragraph 2, sub-paragraph 2, of Article I, lodged their claims for expropriation indemnities against the Agrarian Fund—but the claims had been declared out of time because the petitioners had allowed the period accorded to them by Article XIII of Agreement II to expire and had therefore failed to act within the required time. The three petitioners explained that it was for this reason that they re-submitted their claims, instituting the proceedings on this occasion, not against the Agrarian Fund, but against the Yugoslav State. They declared, in effect, that since their claims had been ruled out of time and they had not been able to obtain compensation from the Agrarian

Fund, the Yugoslav State could not, as against them, rely on the provisions of the Paris Agreements or contend that the Agrarian Fund had taken over the liability of the state, as stipulated in the Yugoslav Agrarian Reform Law of June 19, 1931; that they were, in consequence, being subjected to treatment inconsistent with Article 250 of the Treaty of Trianon, and that in virtue of the aforesaid Article 250 they were entitled to claim from the Yugoslav State, according to the first petitioner (*Esterhazy* case), payment of the value of the expropriated land assessed on the basis of Article X of Agreement III, and according to the other two petitioners (*Pajzs* and *Csaky* cases), payment of the indemnity granted by the Yugoslav law to Yugoslav nationals.

The Court observed that neither the circumstances nor the wording of the three suits under appeal can alter the fact that they present the different characteristics specified in Article I, paragraph 2, and set out above. Neither the fact that the proceedings were instituted against Yugoslavia, instead of against the Agrarian Fund, nor the fact that the claims had been previously declared out of time in regard to the Agrarian Fund, nor again the fact that the petitioners believed that they were entitled to rely on Article 250 of the Treaty of Trianon, nor the fact that two of the petitioners claimed Yugoslav national treatment, nor, lastly, the fact that one of the three petitioners (*Esterhazy* case) asked for an indemnity representing the value of the property computed according to Article X of Agreement III, could exclude or deprive of its effect any one of the characteristics of the legal proceedings contemplated by the Paris Agreements, and which are present in the three suits under appeal. These suits were not thereby removed from the sphere of the aforesaid Agreements and they could not escape their operation.

As regards the fact that the petitioners instituted their proceedings against the Yugoslav State and not—as prescribed in sub-paragraph 2 of paragraph 2 of Article I—against the Agrarian Fund, the Court observed that it was difficult to see anything in that circumstance which could affect the actual character of the suit. It is because a suit presents the characteristics laid down in Article I, paragraph 2, sub-paragraph 1, that the Agrarian Fund becomes liable in place of the Yugoslav State; it is not the fact that a suit has been instituted against the Agrarian Fund, or against the Yugoslav State, that determines whether or not it acquires the characteristics set forth in paragraph 2 of Article I. How can it be argued that the Paris Agreement intended to leave it open to the petitioners to determine the nature of their suit at their own will and to settle for themselves, by their selection of the defendant, who it was who was to be held liable for the expropriation indemnity? Again, there is nothing in the text of any article of the Paris Agreements which would justify the view that, when the rule as to time-limits penalizes the belated submission of a claim by an expropriated Hungarian owner, it would have the singular result of making the Yugoslav State responsible for this belated submission of the claim by debarring it from employing the method of settlement provided by the Paris Agreements. Again, as regards the amount and the method of computing the indemnities claimed by the petitioners in the three suits, it has been shown that the three cases differ from one another; for while one of the petitioners claims the actual value of his property, computed according to the method laid down in Article X of Agreement III, the other petitioners reckon the compensation due to them according to the scale of indemnities laid down by the Yugoslav laws for Yugoslav nationals. But neither the amount of the indemnity claimed, nor the method of computing

it, nor again the basis on which it is alleged that the indemnity should be computed, can modify the character of the claims and, thereby, the character of the three suits, seeing that—as has been shown—their character is precisely that which is described in Article I, paragraph 2, sub-paragraph 1.

On this part of the case the Court accordingly found that, in view of the express terms of Article I of Agreement II, the three judgments under appeal were not delivered in proceedings other than those referred to in that article and, therefore, that in accordance with the provisions of Article X of Agreement II, the appeal lodged against these three judgments could not be entertained.

The Hungarian Government made an alternative claim based upon Article XVII of Agreement II and Article XXII of Agreement III. Both these articles provide that the Court shall have jurisdiction in the event of any difference between the Hungarian and Yugoslav Governments as to the interpretation or application of the respective Agreements. The Hungarian Government submitted that the attitude of the Yugoslav Government in refusing local indemnities to expropriated Hungarians who, for one reason or another, have received no compensation from the Agrarian Fund, was inconsistent with the Agreements. The Court dismissed this claim for the same reasons as the first claim, namely, that the Agreements were confined to providing compensation to Hungarian nationals out of the Agrarian Fund. Where they failed to bring themselves within the remedies afforded, the Yugoslav Government was under no obligation to pay compensation in respect of the application of the agrarian reform.

In the result, the Court dismissed the application of the Hungarian Government. The decision was arrived at by eight votes to six, the majority being President Sir Cecil Hurst, Vice-President Guerrero, Judges Count Rostworowski, Fromageot, de Bustamante, Altamira, Negulesco, and Judge *ad hoc* Zoricic, and the minority Judges Anzilotti, Jonkheer van Eysinga, Nagaoka, Hudson, Hammarskjöld, and Judge *ad hoc* de Tomcsanyi, who delivered dissenting opinions.

ALEXANDER P. FACHIRI.

DECISIONS OF NATIONAL TRIBUNALS INVOLVING POINTS OF PUBLIC OR PRIVATE INTERNATIONAL LAW

DECISIONS OF THE ENGLISH COURTS DURING THE YEAR 1936¹

IN reviewing the decisions of the English courts for the present year, it will be convenient to begin with digests of two judgments on "Gold Clauses" in loan contracts; the first is a decision of the High Court and the second that of the Court of Appeal and House of Lords in a case which was very fully considered in the last number of the *Year Book*² in a discussion of the judgment given in first instance, namely, the case of the United Kingdom gold bonds issued in the United States in 1917. We venture to include—for the purposes of a comparison with the latter case—a translation of a judgment of the Swedish Supreme Court.³ It is unusual to include here foreign decisions, and a review of foreign decisions in general on gold clauses would occupy a volume, but the inclusion of the particular Swedish decision is, we think, justified by the great similarity of the facts in the two cases and—happily—in the reasoning and decisions of the two supreme tribunals. After the summary of these three decisions an attempt is made to consider the law in the light of the English decisions in "currency cases" in the last three or four years.

Case No. 1. British and French Trust Corporation v. New Brunswick Railway Company.
154 L.T. 191 (Hilbery J.).

The defendant company, a Canadian corporation, in 1884 issued 6,000 first mortgage Bonds, which were headed "£100 sterling. First Mortgage Gold Bond" and provided that the defendant company promised to pay the holder "on the 1st August 1934 the sum of one hundred pounds sterling gold coin of Great Britain of the present standard of weight and fineness at its agency in the City of London, with interest thereon at the rate of five pounds sterling per annum payable semi-annually . . . on presentation and surrender of the interest coupons . . . as they severally became due. . . ." The coupons read "Coupon. £2 10s. sterling. The New Brunswick Railway Company will pay bearer two pounds ten shillings sterling . . . being six months' interest . . ."

The plaintiff company were the holders of a number of Bonds issued by the defendant company which they had acquired in August 1934. In November 1934 they had brought an action against the defendant company in respect of one Bond and obtained judgment by default in the same terms as their claim in the present action in respect of the remainder of the Bonds.

The plaintiff company claimed (i) that the gold clause determined the amount of the debt and not the currency in which it should be paid, and relied upon the manner in which the gold clauses in the Bonds in *Feist's* case⁴ had been construed by the House of Lords, and that therefore in respect of the principal sum due under each Bond they were entitled to a sum of money equal to the price in London on August 1, 1934 of the number of grains of gold, of the standard and

¹ In general, all cases reported in the English Law Reports for 1936, and in contemporary reports covering the same period, are reviewed in this number of the *Year Book* (unless they have already been dealt with in the previous number), together with any cases in the reports for 1937 which have appeared at the time of writing, March 1937.

² "International Trustee v. the King", *B.Y.B.*, 1936, p. 205.
³ The writer wishes to acknowledge his indebtedness for this translation to Mr. B. A. Wortley, who in his turn received it through the courtesy of Judge Sandström—a member of the Court.

⁴ [1934] A.C. 161; *B.Y.B.*, 1934, p. 187.

fineness prescribed in the Coinage Act 1870, contained in 100 sovereigns of the weight and standard in currency in the United Kingdom in 1884, and in respect of the interest on the last-half yearly coupon a sum of money equal to $2\frac{1}{2}$ per cent. of the said principal sum; alternatively (ii) damages for breach of the contract, contained in each of the bonds, to pay to the plaintiffs, as the holders thereof on August 1, 1934 the sum of £100 in sterling gold coin of the United Kingdom of the weight and fineness existing in 1884 together with half-yearly interest thereon at £5 sterling per cent. per annum.

The defendants had tendered in respect of each Bond £100 sterling in treasury notes together with £2 10s. by way of interest thereon less income tax. The defendant company claimed that the gold clause in the Bond related to the currency in which the debt had to be paid and that it purported to create an obligation to pay a debt of £100 sterling in gold sovereigns and that by reason of the Coinage Act 1870, the Currency and Bank Notes Act 1914, the Gold Standard Act 1925, the Currency and Bank Notes Act 1928, and the Gold Standard (Amendment) Act 1931, they were entitled to discharge this debt by paying 100 Bank of England notes which were legal tender for a debt of £100, and that any contractual obligation which purported to exclude the provisions of these Acts as to legal tender was unenforceable, and referred to the decision in first instance of Branson J. in the *International Trustee for the Protection of Bondholders*¹ case as an instance where a gold clause in a Bond had been construed as relating to the currency in which payment was to be made.

The plaintiff company contended that the defendant company were precluded from raising this contention by reason of the judgment entered against them on November 7, 1934, in respect of one Bond: the question was *res judicata*; there was an estoppel by record.

Held (1) The contract contained in the bond was one for the repayment of money lent. It was not a contract for the delivery of gold in specie. Consequently the alternative claim for damages for non-delivery of the gold coins could not be maintained if the defendants had tendered that which was legal tender in payment of their indebtedness.

(2) That the question whether the gold clause in the bond determined the amount of the debt or the mode of payment must be ascertained from the intention of the parties as expressed in accordance with the language they had used in its ordinary and literal meaning, unless in the light of other expressions in the bond and of the circumstances existing at the date of the bond it could be shown that this meaning was one which could not have been intended. This was the principle applied by the House of Lords in the *Feist* case.

(3) On a literal construction of the words used, the bond created an obligation to pay in gold sovereigns. There was not, in 1884, any reason why the parties should not contemplate payment being made in that way, whereas in *Feist's* case the bond was issued in 1928 when gold sovereigns were not in circulation. There was no other provision in the bond inconsistent with this view. The bond did not say that the interest must be paid in gold coins, whereas in *Feist's* case the bond did, and the interest was of such an amount (£2 15s.) that it could not be discharged entirely by any gold coins ever in circulation. There was no compelling reason in this case, when the parties were contracting in 1884, to suppose that they were providing against a departure of the United Kingdom from the gold standard, as there was in *Feist's* case when the contract was made in 1928.

(4) That the gold clause in the bond prescribed the mode of payment for a debt of £100 sterling and by reason of the statutory provisions with regard to legal tender this debt could be discharged by the tender of 100 £1 notes.

(5) That the defendants were not precluded from putting forward their contention in this sense by reason of the judgment entered in November 1934 in respect of one

¹ Case No. 2 below: 52 T.L.R. 82; *B.Y.B.*, 1936, p. 205.

bond because, although the parties were the same in both cases, the cause of action in the two cases was not the same seeing that each bond constituted a separate contract creating a separate and distinct cause of action.

Case No. 2. The International Trustee for the Protection of Bondholders Act v. The King, (Branson J.) 52 T.L.R. 82. Court of Appeal 53 T.L.R. 64. *House of Lords* (not yet reported).

In January 1917 certain banks and financial houses in the United States of America, acting on behalf of the Government of the United Kingdom, offered for subscription in the United States a loan of 250 million dollars by the issue of one-year or two-year gold notes, secured upon securities deposited by the Government of the United Kingdom at these banks in the United States, and convertible at the option of the holder into 20 year 5½ per cent. bonds redeemable in February 1937. Some 143,567,000 dollars were so converted. The bonds were in dollar denominations of 1,000, 500, and 100, and provided that the principal and interest "*will be paid at the option of the holder in New York, at an office which will be maintained there by the Obliger for the service of the bonds, in gold coin of the United States of America of the standard of weight and fineness existing on February 1, 1917, or in the City of London in sterling money at the fixed rate of dollars 4·86½ to the pound*" (i.e. the par rate between dollars and sterling).¹

On June 5, 1933, the Congress of the United States passed "Joint Resolution No. 10" relating to gold clauses, and the Government of the United Kingdom took the view that they were henceforth legally entitled to discharge their obligations in respect of payment of the interest of this loan, when payment was made in New York, by paying a number of paper dollars, then legal tender in the United States, equal to the nominal number of dollars of the coupon, but they offered to holders of the bonds a conversion, the effect of which was to increase the capital sum eventually payable under the bonds though not increasing the interest, an offer of which the bulk of the holders availed themselves.

The suppliants in this case, a company incorporated in Lichtenstein, were the holders of a bond for 1,000 dollars which had not been converted. The claim was in respect of a coupon for interest of 27,500 dollars and the suppliants contended that the manner in which the Crown was ready to discharge this payment either in London or in New York was not in accordance with the contract contained in the bond.

The effect of Joint Resolution No. 10 appears from its terms to be as follows:

(i) It applies to provisions in contracts which purport to (a) give a right to require payment in gold or a particular kind of coin or currency of the United States, or, (b) give a right to a payment of an amount in money of the United States measured in relation to gold coin of the United States.

(ii) Both clauses (a) and (b) are declared to be objectionable on the grounds that they obstruct the power of Congress to regulate the value of the money of the United States and are inconsistent with the declared policy of Congress to maintain the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts, and,

(iii) That for these reasons, the provisions of clauses (a) and (b), whether made before or after the date of the Resolution, are declared to be against public policy, and obligations under them are to be discharged upon payment dollar for dollar

¹ In 1917, though sterling was not technically on the gold standard, it did not stand in relation to the dollar at any great discount. Later on, and until 1925, it stood at a considerable discount. From 1925 till 1931 both the dollar and the pound were on the gold standard and were more or less at complete parity in relation to each other. In 1931 the pound went off the gold standard and for two years stood at a discount in relation to the dollar, and in 1933 the dollar went off the gold standard and has, since that date, often stood below the par rate of exchange in relation to the pound sterling.

in any coin or currency which at the time of payment is legal tender for public and private debts.

Held by Branson J.:

(1) If the contract had been one between two individuals it would have been necessary to hold that the "proper law of the contract" was the law of the United States, because the contract was made in the U.S., the money lent was dollars, payment was to be made in the U.S. (subject only to an alternative right of the holder to be paid in London), and the bonds, if registered at all, had to be registered in the U.S. Here, however, one of the parties was a Sovereign, a party who cannot be sued in any court unless he submits to the jurisdiction, and there is a strong presumption that a Sovereign will only submit to the jurisdiction of the courts of his own country (i.e. in the present case to the English courts). Consequently the position was very much as if there had been inserted in the contract an express clause that the English courts should determine all the disputes arising thereunder. Clauses of this kind when inserted have generally been held to mean that English law is also the proper law of the contract. *Therefore, English law must be held to be the proper law of the contract and to apply to the interpretation of the meaning of its provisions.*

(2) (a) The next question was whether the reference in the bond to payment "in gold coin of the U.S. . . ." should be regarded as (i) fixing the mode of payment of the sums named in the bonds; or, (ii) the amount of the debt created by the bond:

(b) The literal meaning of the words used indicated meaning (i), and there was no ground for holding that the words had any other meaning because in the U.S., in 1917, when the contract was made, it was perfectly possible to pay in gold coin of the U.S., except sums under 2½ dollars, and, when legal tender had to be made, it was obligatory to pay such gold coin, and the practice was to regard these gold clauses as meaning exactly what they said, namely, as creating an obligation to pay in gold coin:

(c) The view expressed in (b) above was not different from that adopted by the Supreme Court of the United States in its decisions of February 1933, in *Norman v. Baltimore and Ohio Railway*,¹ and in *Perry v. U.S.*² In *Norman's* case the U.S. Supreme Court treated the question whether the gold clause was one fixing the mode of payment or the amount of the debt as being immaterial to the question which it had to decide (the "constitutionality" of the Joint Resolution No. 10) because the Resolution affected both sorts of clauses equally: in *Perry's* case the Court must have held that the gold clause related to the mode of payment, because otherwise it could not have reached the conclusion that the plaintiff had suffered no damage because he had received x paper dollars instead of x gold dollar coins. It may be possible to contend that x paper dollars are equal in purchasing value to x gold dollar coins when there is legislation preventing the export of gold, but it is not possible to argue that x paper dollars are equal in purchasing value to x plus y paper dollars, which is what the plaintiff would have got if the gold clause had been enforced. Even if these decisions of the U.S. Supreme Court had regarded the gold clauses as relating to the amount of the debt, these decisions, being given in 1935, were not relevant in order to determine the interpretation of a contract which was made in 1917, and governed by English law.

(d) Paragraph (b) above was not inconsistent with the decisions of the House of Lords in the *Feist*³ case, although the House of Lords held that the gold clause there determined the amount of the debt and not the mode of payment, because (i) the language of the contracts, and (ii) the surrounding circumstances in *Feist's* case were different from those of the present case. As regards (i), here the reference to "gold coin" came in a paragraph relating to places and media of payment which was separated from that in which the amount of the debt was described. In *Feist's* case this was not so and there was a provision that the bond was "one of an issue

¹ 55 S.C. 407.

² 55 S.C. 432.

³ [1934] A.C. 161.

of £500,000 in sterling in gold coins of the U.S." to which there was no counterpart in the bond in this case. As regards (ii), gold coin was not in circulation in the United Kingdom when the contract in *Feist's* case was made—that contract requiring payment in the United Kingdom—whereas here the contract required payment in gold coin in the U.S. and at the time the contract was concluded it was in circulation there.

(e) *For these reasons the gold clause in the present case must be interpreted as (i) fixing the mode of payment and not the amount of the debt, and (ii) actually requiring payment in gold coin.*

(3) (Upon evidence of U.S. law):

(a) After June, 1933, it had become not merely impossible, but also illegal, to discharge an obligation in the United States in gold coin as the bond required.

(b) It was not possible to consider that this Joint Resolution did not apply to payment by foreigners or foreign Sovereigns, because the reasons of policy upon which it was based would be defeated if such exceptions were allowed; and though, under international law, legal action could not be taken in the courts against a foreign Sovereign which infringed the Resolution, this did not mean that the foreign Sovereign had immunity from the operation of the law in respect of his acts within the jurisdiction, but merely that he had immunity from legal process.

(c) The provision of a contract, even if English law is the proper law of the contract, which requires something to be done in a foreign country which is illegal by the law of that country, is void.

(d) For these reasons the provision of this bond requiring payment *in New York in gold coin was void.*

(4) Even if the conclusion arrived at in (2) above as to the meaning of the gold clause was wrong and consequently the number of dollars to be paid in the United States might vary in accordance with the relation of the dollar, which was legal tender at any time, to the gold dollar of February 1917, the provision of the bond as regards payment in London at a fixed rate must mean payment of such a sum in sterling as would equal the nominal value of the coupon in dollars at the fixed rate.

Held by the Court of Appeal:

(i) (affirming Branson J.) English law was "proper law of contract".

(ii) (overruling Branson J.) that the gold clause was a "gold value" clause fixing the amount of the debt: because (a) although in 1917 the U.S. was on the gold standard and the paper dollar was convertible into gold, the evidence of U.S. lawyers was that for practical purposes no distinction was drawn between the paper dollar and gold dollar, and gold was never tendered in payment, and that these gold clauses were inserted to safeguard against a depreciation of the dollar; (b) there was no substantial distinction between the language of the bonds here and those considered by the House of Lords in *Feist's* case, which was the governing decision for English contracts containing these clauses; (c) the Supreme Court of the U.S. had clearly held in *Norman's* case that such gold clauses were "gold value" clauses.

(iii) That, while the views of Branson J. on points 3 (a), (b), and (c) were correct, nothing in the Joint Resolution of 1933 made it *illegal* or *impossible* for a debtor to fulfil a gold value clause to the letter; its effect was merely that he could not be compelled to do so in the courts of the U.S. and, this contract being an English contract, U.S. law, only as the *lex loci solutionis*, had to be taken into account as affecting the obligations under it to the extent that it made the performance impossible or illegal, and therefore the Government of the United Kingdom were obliged under the contract to pay in the U.S. a number of paper dollars equal in value to the specified number of gold dollars.

(iv) As regards payment in London, the view of Branson J. was correct.

Held by the House of Lords:

(i) (overruling Branson J. and Court of Appeal) that the proper law of the contract was U.S. law: on the grounds that (a) though the fact that one of the parties to

a contract is the government of a Sovereign State is a factor of great weight in favour of the law of that state as the proper law of the contract, it is not conclusive since a government *can* agree that a contract concluded with it shall be governed by a foreign law, and its intention to do so may be expressed or may be inferred from circumstances clearly pointing to this conclusion; (b) in this case the Treasury of the United Kingdom had, under the War Loan Act 1916, authority to raise money on such conditions as it thought fit and therefore on condition of making a contract governed by a foreign law; (c) the fact that a government cannot be sued, without its consent, in the courts of a foreign country is also not a conclusive argument against the view that it may have submitted to a foreign law to govern the contract, because in some countries a government cannot be sued, without its consent, in its own courts and in any case, to ascertain the effect of a contract is one thing and to enforce it another, and a contract may be governed by the law of one country and only be enforceable in the courts of another;¹ (d) the bonds in this case were issued for the conversion of the short-term gold notes by which the loan was raised; they were, in effect, a long-term renewal of these notes and differed in their terms from these notes only in being long term and in not being secured by the pledged securities deposited with bankers in the United States; there were, therefore, conclusive reasons for holding that the law which governed the obligations under the notes and under the bonds was the same; (e) the notes were issued in the U.S., expressed in U.S. currency, and to be paid (on one option) in the U.S., on a value to be ascertained by reference to U.S. coins; they were further secured by a pledge agreement made and performed in the U.S., by the deposit with a U.S. company of securities in terms clearly giving rights governed by the U.S. law as to maintaining margins of value, redemption, and enforcement by sale—a judicial sale by orders of a U.S. court—and it was stipulated that the U.S. company was to be protected if it acted with regard to the securities on the advice of counsel selected by it—clearly U.S. counsel advising on U.S. law—and in these circumstances the conclusion that the notes were governed by U.S. law was irresistible;

(ii) That the contract being governed by U.S. law (the law in force in New York), the Joint Resolution of Congress of 1933 clearly applied to it and, that Resolution having enacted that pre-existing contracts containing such a gold clause (whether it was a “gold value” of a “gold coin” clause) should be discharged by payment of a number of paper dollars equal to the number of gold dollars stipulated in the contract, it could not be said that since 1933 the contract created an obligation to pay or a right to receive a larger number of paper dollars.

(iii) As regards payments in London, the House of Lords agreed with both courts below.

Case No. 3. In the Swedish Supreme Court.

Judgment in the case of the *Försäkringsaktiebolaget Skandia* (The Skandia Insurance Company, Limited) v. *the Riksgäldskontoret* (The Swedish National Debt Office), the parties being alternately plaintiff and defendant (given on the thirtieth day of January, 1937).

The Skandia Company contend that upon presentation by the Company of interest coupons matured on May 1 and November 1, 1933, and belonging to bonds of a loan raised by the Swedish National Debt Office in New York in 1924, the said Office was

¹ There are decisions, however, of the English courts, which are treated as binding by the High Court and, probably, by the Court of Appeal, to the effect that a clause in a contract providing that disputes shall be referred to the courts of country X or to arbitration under the law of country X is to be taken as a conclusive presumption that the law of country X is the proper law of the contract. It would appear that too much weight has been attached to this presumption and in view of this decision such clauses are only strong arguments in favour of the law of country X.

under obligation to redeem these coupons by paying in currency of the United States which at the time of presentation was legal tender, such sum as corresponded to the gold value of the number of gold dollars of a specific weight and fineness stated in the coupons. The National Debt Office, on the other hand, maintain that by virtue of the Joint Resolution passed by the Congress of the United States of America, and approved by the President on June 5, 1933, their obligation could be duly discharged by means of the payment which the National Debt Office, with regard to the May coupons, had effected and, with regard to the November coupons, have offered to effect in dollars in currency then in actual use at the same nominal amount as the promised gold dollars.

In considering the case in dispute, the first point to be examined is whether Swedish law or the law of the State of New York should be given preference in governing the legal relationship in general between the National Debt Office and the bondholders. In this choice—which must apply uniformly to all bonds, irrespective of the nationality and residence of the bondholder at any given time—the bonds themselves must in all essentials serve as guide. The contract concluded between the National Debt Office and the bank in New York that has underwritten and issued the loan cannot, on the contrary, be considered relevant in this respect as it is not quoted in the bonds. However, the bonds do not contain any express declaration by the National Debt Office as to which law is to be applied to them, nor any other statement that can justly be interpreted by the bondholders as expressing any definite intention in regard thereto. Under such circumstances the decision must be arrived at by weighing against one another the objective factors in the legal relationship that are calculated to turn the scales in favour of one side or the other.

The foremost consideration—and one of substantial weight—in support of the opinion that Swedish law should be the deciding authority is that from the very beginning it is a question of a unilateral obligation, in respect of which the sovereign Swedish State is the debtor, and, further, that this sovereign state has not expressed in the bonds any intention to submit to a foreign law in regard to the legal relationship constituted by the obligation, a declaration which not infrequently is explicitly made by prospective borrowers seeking to raise a bond loan on the American market. Whereas the debtor is Swedish, the creditors, on the other hand, may be of varying nationality and residence, seeing that the bonds are issued to bearer. Indeed, in the text of the bonds this has been foreseen, and especially the possibility of the bonds passing into Swedish hands.

The principal argument in favour of the opposite opinion—that the law of the State of New York shall be applied—is the fact that the bonds are made payable as to both principal and interest in New York only, and that they are issued only in United States dollars. Other clauses, although they are primarily a natural outcome of those just mentioned and, if regarded separately, are of minor consequence, serve to strengthen the impression that the bonds in reality belong to the American market. Thus, the loan has been issued in New York through a bank there. There is no indication in the bonds as to the place where they were made out, but they are drawn up in the English language and their wording and appearance are characteristic of American bonds. They are declared to be valid only if provided with the authentication of a Fiscal Agent domiciled in New York. Holdings of these bonds can be registered only with this Agent. Notice of redemption of the loan is to be published in New York newspapers only.

Regarding the place of payment, it is true that since 1927, in order to oblige bondholders, the National Debt Office has agreed to pay interest coupons, if desired, in Stockholm also; but this procedure has not implied any amendment of the legally binding clause relating to the place of payment.

In view of the somewhat exclusive consideration given to the American market, to which the bonds themselves thus testify, the Supreme Court finds that with regard not only to the modalities of payment, but also to more essential parts of the sub-

stance of the obligation, the debt has a more natural connexion with the law of the place of payment than with the law of the debtor's country, even though the latter, from the standpoint of the place of payment, is a foreign sovereign state.

However, a further point to be considered is what significance should be attached to the aforesaid as regards the question of the still binding force of the declaration in the bonds that they are payable as to both principal and interest in gold coin of the United States, of, or equal to, the standard of weight and fineness existing at the date of issue of the bonds. Such a gold clause was undoubtedly valid at the time mentioned, both according to the law of the State of New York and according to Swedish law. Subsequently, however, it was enacted through the aforesaid Joint Resolution—which has been declared constitutional by the Supreme Court of the United States and which applies to all the Federal States, and consequently also to the State of New York—that every obligation, even those theretofore incurred, shall, irrespective of any such clause, be duly discharged upon payment of the contracted amount of dollars in any coin or currency of the United States which at the time of payment is legal tender for public and private debts. As may be inferred from the wording, and as is confirmed by the preamble to the Resolution and by the proceedings at the time it was passed, this provision is valid irrespective of the nationality and residence of the creditor and the debtor. It is likewise of no consequence whether or not the debt fell due for payment before or after the promulgation of the Resolution.

According to the law of the State of New York, the National Debt Office is thus not bound to pay the interest coupons, the place of payment of which is the City of New York, at any amount other than, or in excess of, their nominal amount in United States notes in circulation. When considering the question whether the law of the said state shall in that respect be applied in this country, it should first of all be remembered that, according to generally recognized principles of justice, there could obviously have been no question of any Swedish legislation passed to invalidate the gold clause being extended to apply to bonds such as those in question, which are issued exclusively in terms of a foreign currency and are payable only at a place within the country of that currency. The connexion with Swedish law that is represented by the debtor's person is for that purpose the more insufficient as the debtor has not stipulated that the contracted obligation shall be subject to Swedish law.

The question, then, is whether, on the other hand, the aforesaid connexion with Swedish law, combined with the fact that the bonds do not contain any expression of the debtor's intention to submit in respect thereof to the law of the country of the currency, must nevertheless be deemed to constitute a sufficient reason for a Swedish court to disregard a law that was promulgated in the country of the currency after the issue of the bonds and which invalidates the gold clause. An unqualified affirmative answer to this question—which would imply that, from the point of view of Swedish jurisdiction, the bonds would, owing to their, so to speak, inter-state character, be immune from legislation against gold clauses in any country whatsoever—does not seem justified. The scope and aim of the legislative measure adopted by the country of the currency must be taken into consideration. In the present case, the legislation in question affects equally all obligations contracted in the currency of the country, so that foreign creditors, for example, are not placed in a different and inferior position compared with domestic creditors. Moreover, the declared, and obviously also the real, purpose is to carry out a reform of the country's monetary system involving the assignment of an equal value to all currency in general use as legal tender. Under such circumstances there is no valid reason for Swedish jurisdiction to disregard the above-mentioned close connexion of the bonds with the State of New York, and to deprive the legislation of that State invalidating the gold clause of its effect upon the legal relationship between debtor and bondholder. Nor can, as has already been mentioned with regard to their legal relationship in general,

consideration of the nationality or residence of a given bondholder lead to any other conclusion regarding his right.

For these reasons the Supreme Court decides (1) to uphold the conclusion of the judgment of the Court of Appeal in so far as the claim of the Company regarding the coupons which matured on May 1, 1933, has been dismissed, (2) reversing the decision of the Court of Appeal concerning the coupons matured on November 1, 1933, to declare the National Debt Office liable only to redeem the coupons at their nominal amount in legal tender of the United States in use at the time.

There have now been a number of English decisions dealing with contracts for the payment of money, in circumstances where complications were created by currency fluctuations and legislative measures taken by different countries for the regulation or protection of their currency. It may be interesting to endeavour to appreciate the position resulting from these decisions. The cases which it is desired to consider in this connexion are the *Feist* case;¹ the *Adelaide Electric Supply Company* case;² *de Béeche v. the South American Stores*;³ the *International Trustee for the Protection of Bondholders* case;⁴ the *New Brunswick Railway Company* case.⁵

In these cases there are always the four following elements to be taken into consideration which should logically be considered in the order here set out:

1. What is the proper law of the contract.
2. Interpretation of the meaning of the contract in the light of its proper law.
3. Effect on the contract of its proper law in matters other than its interpretation.
4. Effect upon the contract of the law of the place of payment. (It is of course not necessary to consider (4) separately from (3) if the law of the place of payment is also the proper law.)

To take point (1) first. The proper law of the contract is, of course, the law which the parties have expressly designated as intended to govern the contract and, in the absence of such express designation, that law which the court presumes to have been intended because it is considered to be the legal system with which the contract has the most real connexion. The law of the place of payment may be, but is not necessarily, the proper law of the contract. It must also be remembered that it is not necessary that a contract should have one proper law only. There have been many cases where it has been held that a contract has to be split up with one law governing one part of the contract as the proper law and another law another part. In the *Feist* case and in the *New Brunswick Railway* case there was no difficulty as regards the proper law. In both cases the proper law was clearly English law and England was also the place of payment. In the *South American Stores* case Chilean law was undoubtedly the proper law and also the law of the place of payment. In the *Adelaide Electric Supply Company* case the position was more complicated, but two Law Lords in the House of Lords (see pages 137 and 145 of the report) stated that English law was the proper law of the contract; the place of payment was in Australia. In the *International Trustee* case the question what was the proper law was one of the vital and contested points. Apart from the character of one of the contracting parties there would have been no doubt but that the proper law was United States law, and the House of Lords made it clear that the fact that one of the parties was the United Kingdom Government would not prevail, in the face of other strong indications to the contrary, to prevent United States law being the proper law of the contract. The place of payment was in the United States. The case is clearly distinguishable from those other cases, such as the *Serbian and Brazilian Loans* case decided by the P.C.I.J. and the old English case of *Smith v. Weguelin*, where it was held that the proper law was the law of the country whose government was one of the contracting parties, for in these latter cases the government was floating a loan simultaneously in the money markets

¹ [1934] A.C. 161: *B.Y.B.*, 1934, pp. 184 and 187.

² [1934] A.C. 122: *B.Y.B.*, 1934, pp. 184 and 189.

³ [1935] A.C. 149: *B.Y.B.*, 1936, p. 215—see also Case No. 16, below.

⁴ Case No. 2, above, and *B.Y.B.*, 1936, p. 205.

⁵ Case No. 1, above.

of a number of different countries and there was every reason to hold that the proper law in relation to all the bonds must be the same, and this could, in the circumstances, hardly have been any law other than that of the debtor country.

(2) The next task is the interpretation of the contract, and the first point to be noticed, is that the terms of the contract have to be interpreted in the light of its proper law. Thus (on the assumption that the view is right that an Australian pound is different from an English pound) the word "pound" in an Australian contract means an Australian pound sterling and in an English contract a pound sterling—without prejudice to the effect which Australian law may have on the method of discharge if payment is to be made in Australia (*Adelaide Electric Supply Company* case). It was consequently perfectly correct of Branson J. and the Court of Appeal in the *International Trustee* case to refer to the House of Lords' decision in the *Feist* case as the governing authority on the interpretation of the gold clause, because they held the proper law of the contract to be English law. It is a little surprising, however, to find the House of Lords, who held the proper law to be United States law, still apparently considering the *Feist* case as the primary authority for the interpretation of the gold clause and the decisions of the United States Supreme Court as a secondary authority, whereas it would appear the reverse should have been the case. The second point is whether the gold clauses should be interpreted as being gold-value clauses or clauses providing for payment in gold coin. In most of the continental cases, as also in the *Serbian and Brazilian Loans* case before the P.C.I.J., the contractual documents appear to have been completely ambiguous on this point so far as the language used was concerned. Therefore it was not difficult for the P.C.I.J. to choose out of two meanings equally possible on the language of the instrument that meaning which alone gave the provisions any efficacy. The position is different as regards the American bonds and the English bonds, which apparently borrowed the American gold clauses. They all, construed purely literally according to the natural meaning of the words, provided for payment in gold coin, and therefore it was natural that Hilbery J. in the *New Brunswick Railway* case should construe the clause as providing for payment in gold coin, there being no other provision in the document inconsistent with such a view, and such an intention not being clearly an impossible one for the parties to have had at the time the contract was made. In the *Feist* case, on the other hand, in view of the circumstances prevailing at the time of the contract, it was virtually impossible to suppose that the parties meant payment in gold coin, although this is what they said. Therefore, and also because of other inconsistent provisions in the contract, the House of Lords held that the clause was a "gold-value" clause. In the *International Trustee* case the clause said payment in gold coin, and it is not impossible, although unlikely at the time this contract was made, that this is what was meant. The Court of Appeal in holding that the clause was a gold-value clause and the House of Lords who expressed their agreement with this view, although it was not necessary for them in view of their decision on point No. 1 to decide it, showed in their judgments a strong disposition to treat the decision in the *Feist* case as a legal ruling upon the interpretation of gold clauses generally, at any rate in English contracts if not in foreign contracts also, though as the question is one of the interpretation of private contracts it would still appear that each contract must be interpreted upon its own language and the circumstances in which each individually was concluded. The history of gold clauses in the United States appears shortly to be that there were at one time simultaneously in currency gold dollars in coin and paper dollars (greenbacks) and that the value of the former was greater than that of the latter. Both were legal tender, but it was accepted as being permissible in a contract to stipulate for payment in one form of legal tender rather than the other. Therefore originally the clauses were gold-coin clauses though the creditor was no doubt willing to accept payment in paper if he got a correspondingly larger number of dollars. As time went on, as a matter of business they became treated more and more as purely gold-value clauses, and it is clear that the United States Supreme Court in *Norman's* case (where, however, the point was not necessary for the decision) held such clauses to be gold-value clauses.

In *Perry's* case, however, where the point was material for the decision on the question of damages, it is difficult to understand the judgment of the Supreme Court on any other basis except that they were treating the clause as a gold-coin clause.

Gold clauses in contracts therefore afford few grounds for congratulation either to the lawyers who drafted them or the business men who used them. In most cases they have been content to use language which on a vital point was entirely ambiguous or else expressed literally the opposite to what was intended.

Point No. 3—effect of the proper law in matters other than interpretation. Since the proper law is the law which the parties are taken to have submitted themselves to in making the contract, the contract is subject to whatever effect that law may produce upon the obligations, whether that particular effect was intended by the parties or not. Thus the proper law of the contract in the *International Trustee* case being United States law and the Joint Resolution of Congress striking down gold clauses in either form and providing for discharge by payment of the nominal amount of the bond in paper dollars, the contract is affected by this provision of its proper law. Contracts with gold-value clauses whose proper law is English are not affected in this way because English law has nothing corresponding to the Joint Resolution of Congress or any doctrine making such clauses contrary to public policy. Similarly, provisions in contracts which are made illegal or invalid by the proper law cannot be enforced. This is what is meant, though the phraseology is unfortunate, when it is said that the proper law of the contract governs its "essential validity". It is difficult, however, to find an adequate phrase.

(4) The effect of the law of the place of payment—We are here considering the *lex loci solutionis* on the footing that that law is not the proper law of any part of the contract, and the rule is (as stated by the Court of Appeal in the *International Trustee* case) that no provision in a contract which requires something to be done which is made illegal or impossible by the law of the place of performance can be enforced but that no other effect need be given to the law of the place of performance as such. Thus, if the law of the place of payment makes it illegal or impossible to pay in gold coin, then payment in gold coin cannot be enforced, although there is nothing against this under the proper law of the contract. This is shown by the *International Trustee* case in the decision of Branson J. who held that the clause provided for payment in the United States in gold coin, and also by the decision in the *New Brunswick* case, where the place of payment was England and the clause construed as a gold-coin clause would have infringed the English statutory provisions with regard to legal tender.

There is still, however, a further important point. Were the Court of Appeal in the *International Trustee* case right in holding that the United Kingdom bonds still created in 1933 an obligation enforceable in England to pay the value of gold in paper dollars, on the assumption that the clause was a gold-value clause and that English law was in general the proper law of the contract? Does it not rather follow that when a contract creates an obligation to pay a debt in country X in the currency of country X there is a submission to the law of country X as regards the whole question as to what must be paid to discharge the debt? Is it right in such a case to attribute to the law of country X only that effect which necessarily follows from X being the place of payment? It is suggested that in such a case the law of country X must be regarded at least as *the proper law of that part of the contract which relates to payment in country X, even though in the case of other parts of the contract the proper law is another law*, and that the Court of Appeal, even if they held that English law was the proper law of the contract for the purposes of interpretation and for the purposes of payment in England, should nevertheless have held that United States law was the proper law as regards the payment in the United States. Such a conclusion is indeed suggested in the short judgment of Lord Roche in the House of Lords, who points out that a contract can have two proper laws governing different parts of it, although he did not rely upon it because he agreed with the other Law Lords in regarding United States law as the proper law of the contract generally. (*Query*, however, whether as regards the payments in England under this contract English law is not the proper law.) Moreover, such a view appears to be clearly

indicated by the judgments of the House of Lords in the *Adelaide Electric Supply Company* case. There a payment had to be made in Australia in pounds, and Lord Tomlin, for instance, after stating (at p. 145) that English law is the proper law of the contract, goes on to say "Where, in an English contract governed *prima facie* by English law, there is a provision for performance in part in another country, the *prima facie* presumption is that that performance is to be in accordance with the local law" and Lord Wright said (at p. 151) "It is established *prima facie* whatever is the proper law of the contract regarded as a whole, the law of the place of performance should be applied in respect of any particular obligation in a particular country other than the country of the proper law of the contract." The statement of Lord Wright here is perhaps too wide as a general proposition, but he was referring to an obligation to pay money and his view expressed there seems clearly to support the suggestion made above. Although the value of the Australian pound was lower than the English pound, and although some of the Law Lords held that the Australian pound was legally distinct from the English pound and that the proper law of the contract was English and therefore the contractual pounds were sterling, yet all the Law Lords agreed that payment could be made in Australia by tendering Australian pounds of the contractual number because of the operation of Australian law as the law of the place of payment—although Australian law did not make it illegal or impossible to pay a larger number of Australian pounds equal in value to the contractual number of English pounds. The decision of the Court of Appeal in the *International Trustee* case appears to be at variance with that of the House of Lords in the *Adelaide Electric Company* case, and the discrepancy is the more remarkable because Lord Wright participated in both judgments. It would appear, however, from the report that the view here put forward was not pressed in the arguments in that case, namely, that even if English law was the proper law of the contract as a whole, nevertheless a contract may have more than one proper law as regards different portions of it, and where it provides for payment in a foreign country in the currency of that country the law of that country must be the proper law as regards all that appertains to the discharge of the contract by payment, and that the judgments of the House of Lords in the *Adelaide* case are strong authority for this view.

Our next case is a decision of the House of Lords in a "Russian Bank case" which in its earlier stages has been more than once noticed in these columns. The actual point for decision was the technical one whether the English liquidator of the English branch of a defunct Russian corporation could, when bringing proceedings to collect the assets of the branch, sue in the name of the dissolved corporation or must sue in his own name, but the judgment affords valuable information on the interesting question of the whole position of the English branch of such a dissolved foreign corporate body—before and after the English order for liquidation.

Case No. 4. Russian and English Bank v. Baring Bros. [1936] A.C. 405 (House of Lords).

The Russian and English Bank was incorporated in 1910 under the laws of Imperial Russia. The majority of the shares were held by British subjects, and in 1915 it established a branch in London. During the war this Bank paid to a Danish firm a sum of £186,980 on the instructions of the Russian Imperial Government, and the latter government (as claimed on behalf of the Bank) assigned to the Bank an equivalent sum out of moneys standing to their credit with Baring Bros.¹

In November 1917 the Bolshevik Revolution took place in Russia and the plaintiff Bank ceased to carry on any business there, and various Soviet decrees were passed under which Russian banks were liquidated and nationalized. The branch in London of the plaintiff Bank purported to continue to carry on business and in 1921

¹ Further facts with regard to this aspect of the case will be found in the note in the Year Book for 1933, page 187, of the first hearing of the action before Eve J.: [1932] 1 Ch. 435.

began an action against the defendants claiming £186,980. For various reasons the action remained dormant till 1929, when the pleadings were amended and the Attorney-General was added as a defendant. In 1931 the defendants took out a summons, asking that the proceedings should be stayed on the ground that the plaintiff had ceased to exist as a juristic person under the law of the country of its incorporation (in the House of Lords Lord Blanesburgh held it had so ceased to exist from January 26, 1918); that this caused its existence to terminate in the United Kingdom although it had a branch there; and consequently this action brought by the English branch in the name of the Bank could not be maintained and must be stayed. Eve J. accepted this view and stayed the action though he gave the parties liberty to make a further application in the action.¹ Creditors of the Bank then presented a petition for the compulsory winding-up of the Bank under section 338 of the Companies Act, and Bennett J. held that there was jurisdiction to wind up the English branch under that section, and made an order accordingly. He, however, based his order *not* on sub-section (2) which gave power to wind up, as an unregistered company, companies "incorporated outside Great Britain" when they "ceased to carry on business in Great Britain", although they may have been already "dissolved or otherwise ceased to exist as a company under, or by virtue of, the laws of the country under which they were incorporated" on the ground that this sub-section only applied when the Company had ceased to carry on business in the United Kingdom after the coming into force of the Act, but on sub-section (1) of section 338, which gave power to wind up "unregistered companies" in cases where *inter alia* they had been dissolved or ceased to carry on business and was a verbatim reproduction of a provision in an earlier Act.²

A liquidator having been appointed, an application was made in 1933 by the liquidator in the name of the Bank, that on account of the winding-up order the stay on the original action should now be removed and the action allowed to proceed, but Bennett J. held that the making of the winding-up order in respect of the English branch of a defunct foreign corporation did not have the effect of temporarily recreating the corporation as a juristic person so as to render it possible for that action to be continued in the name of the Bank, although it might be that the name of the Bank could be used for some purposes of the winding-up.³

In 1934 the liquidator of the Bank, having obtained the sanction necessary under section 191 of the Companies Act to bring proceedings in the name of the Bank, instituted a fresh action against the defendants in respect of the same claim as was the subject of the first action, but this action was stayed by Clauson J., and the Court of Appeal confirmed his order and ordered the costs to be paid personally by the solicitors.⁴ It was held that, although section 338 of the Companies Act says that all the provisions of the Act with regard to the winding-up of companies shall apply to unregistered and foreign companies wound up under its provisions, and although this includes by virtue of sections 342 and 191 the right of the liquidator to bring an action in the name of the Company, even so, the liquidator could not bring proceedings in the name of an entity which had already ceased to exist. The winding-up order did not temporarily restore the existence of the defunct Company. This procedure only applied if the Company, being liquidated, could have sued itself. The liquidator could, however, under another section, 190, obtain an order vesting all the property of the Company in him and then bring actions in his own official name if such were necessary for the purpose of getting in the assets in order to wind up the branch in England.

This procedure under section 190 entails certain disadvantages as compared with

¹ [1932] 1 Ch. 435: *B.Y.B.*, 1933, pp. 187-9.

² [1932] 1 Ch. 663: *B.Y.B.*, 1933, p. 189.

³ [1934] 1 Ch. 276: *B.Y.B.*, 1934, p. 192.

⁴ [1935] 1 Ch. 120: *B.Y.B.*, 1934, pp. 201-2.

the alternative procedure under section 191, and for this reason and on account of the order for costs, the liquidator appealed to the House of Lords.

It was held by Lords Blanesburgh, Atkin, and Macmillan:

(1) that the winding-up order in respect of this Bank might have been made under sub-section (2) of section 338 which was not confined, as Bennett J. held, to companies which had ceased to carry on business after the date of the coming into force of the Act; but no objection was taken to the order made under sub-section (1);

(2) that the effect of the winding-up order under section 338 was to make the Bank a company to the extent provided by Part X of the Act, and a company to which all the provisions of the Act with regard to winding-up applied. The effect of the provisions of the Act is that when a winding-up order is made in respect of the English branch of an already dissolved foreign company, the company is to be treated for the purposes of the winding-up procedure as if it had not been dissolved. In the case of such a company, the entity itself was beyond the control of United Kingdom legislation, but the United Kingdom legislature could say that for the purposes of the procedure of the English winding-up, that dissolution shall be ignored.

(3) Therefore section 198 (1) applied and the liquidator could, having obtained the sanctions necessary, bring an action in the name of the Bank. The liquidator in bringing his proceedings would be completely under the control of the English court which would be vigilant to see that an order affecting the rights of the Attorney-General (on behalf of the Crown) or of the Soviet Government should not be made without due notice to each.

(4) The alternative view of the effect of the statutory provisions referred to in (1) and (2) above would defeat the intentions of the legislature and render the winding-up provided for in the Act an absurdity since the result was that, although a winding-up order was made, there was no company; no debts of the Company, because the debts of or to a corporation which is defunct are extinguished by its dissolution; no assets of the Company, since the movable properties of a defunct company are vested in the Crown as *bona vacantia*; and on that view the vesting order under section 190, on which the courts below relied, could not take effect. The effect of the winding-up order as held by the majority of the House was, however, that the title of the Crown to these assets, which arose when the Company first ceased to exist by reason of its dissolution in its country of origin (recognized here as destroying the entity of the Company), was defeated by the winding-up order which operated as a re-creation of the company for a necessary but limited purpose.

Lords Russell of Killowen and Maugham dissented, taking the same view as the Court of Appeal and Clauson J.

In Case No. 5, *Grein v. Imperial Airways*,¹ the Court of Appeal reversed a decision in first instance which was fully reviewed in the last number of the *Year Book*.² For this reason no digest of the case will be given here but an endeavour will be made to discuss the legal position in the light of the two judgments. As stated in the last number of the *Year Book*, this case is of interest as a decision—the first reported English decision—on “the general conditions for the carriage of passengers and goods by air” and on the interpretation of the general international convention opened for signature at Warsaw on October 21, 1929, for the “unification of certain rules relating to international carriage by air”. This year, however, there is a second judicial decision on these conditions and on the interpretation, which will be considered after *Grein's* case.

The question at issue in *Grein's* case was the liability of the carrier to pay compensation to the relatives of a person who had lost his life owing to an accident in the aeroplane in which he was travelling. The legal position is different according to whether the journey on which the accident occurred is part of an “international carriage” or part of a carriage which is not international and is called conventionally an “internal

¹ [1937] 1 K.B. 50.

² 1936, p. 212.

carriage", an expression which may be misleading because it covers some carriages which go beyond the frontiers. The first question which arises, therefore, is whether the accident occurred during an "international carriage" or not. This question turns on the application of a definition of the expression in Article 1 (2) of the Warsaw Convention, which Convention is scheduled to the Carriage by Air Act 1932 and is thereby made part of the law of the United Kingdom. This definition is given in full in the footnote below.¹ A carriage is international if the point of departure is in the territory of one High Contracting Party to the convention and the point of destination in the territory of another High Contracting Party. It is also international if, though the points of departure and destination are both in the territories of the same High Contracting Party, there is an agreed stopping-place in the territories of another Power whether party to the convention or not. It is not international if the point of departure is in the territory of a High Contracting Party and the point of destination is in the territory of another Power not a party to the convention or vice versa, and it is not international if both these points are in the territory of the same High Contracting Party without any agreed stopping-place outside. In *Grein's* case the deceased man had taken a ticket in London entitling him to travel from London to Antwerp, the aeroplane stopping at Brussels on the journey, and to return within fifteen days from Antwerp to London with a stop at Brussels. The ticket consisted of two sheets for the outward and return journey respectively and he paid £6 8s. for it, £4 being for the outward journey and £2 8s. for the return journey, which was refundable if he did not travel back by air. The writing on the ticket was such as to indicate London as the place of departure and Antwerp as the place of destination (and vice versa for the return journey) with an agreed stopping-place at Brussels. Mr. Grein lost his life in an accident to the aeroplane in Belgium on the return journey in circumstances which both courts agreed indicated a negligent error of judgment on the part of the pilot. The United Kingdom is a party to the Warsaw Convention but Belgium is not. Clearly therefore a carriage from Antwerp to London alone would not be international carriage.

The majority of the Court of Appeal (Greene L.J. and Talbot J.) held, however, that this accident occurred on an international carriage on the ground that the return ticket was one contract for a carriage to Belgium and back to London and that there was, therefore, a carriage with London as the point of departure and of destination with an agreed stopping-place, Antwerp, in the territory of another Power. In order to see whether the carriage came within the definition it was not the journey or the flight which was relevant but the itinerary covered by the contract of carriage. Reliance was placed in this connexion on Article 1 (3) of the Convention which in certain circumstances causes a number of journeys to be regarded as one carriage even though there may be

¹ Article 1 of the Convention: "This Convention applies to all international carriage of persons . . . by aircraft for reward. . . ."

Article 1 (2): "For the purposes of this Convention the expression 'international carriage' means any carriage in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a trans-shipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping-place within a territory subject to the sovereignty, suzerainty, mandate or authority of another Power, even though that Power is not a party to this Convention. A carriage without such an agreed stopping-place between territories subject to the sovereignty . . . of the same High Contracting Party is not deemed to be international for the purposes of this Convention."

Article 1 (3): "A carriage to be performed by several successive air carriers is deemed, for the purposes of this Convention, to be one undivided carriage, if it has been regarded by the parties as a single operation, whether it had been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party."

separate contracts with different carriers for portions of the journey. The words "place of departure" and "place of destination" in the definition referred to the place at which the contractual carriage began and ended respectively. An agreed stopping-place meant a place where, according to the contract, a machine by which the contract is to be performed will stop in the course of performing the contractual carriage whatever the purposes of the descent may be and whether or not the passenger has the right to break his journey at that place, and if so, for however long. It was stressed that this definition must be interpreted in the light of the object of the Convention which was to provide a uniform system of law to determine the obligations of carriers by air in cases of international carriage to be applied by the courts of all the countries participating in the Convention, and to prevent the conflicts of law and of jurisdiction which in the absence of such an international agreement would inevitably arise.

Greer L.J. (who dissented in the Court of Appeal) and Lewis J. in First Instance took the opposite view on the question whether this carriage was covered by the definition of international carriage. Their view was founded on the ground that the return ticket created two separate contracts for two separate carriages.

The terms of the contract between the deceased and the carrier, Imperial Airways, consisted in the "general conditions for the carriage of passengers and goods by air which were annexed to the ticket". The bulk of the conditions were by the terms thereof applicable to both types of carriages including those most relevant in the present case which (a) determined the circumstances in which the carrier might be liable to pay damages, and (b) limited the amount of damages payable (Articles 18, 19, and 20 of the general conditions), though there were some (not material to the present case) which applied to one form of carriage and not the other. The effect of these conditions was (1) that the carrier is liable for damage sustained in the event of the death or wounding of a passenger . . . if the accident which caused the damage took place on board the aircraft or in the course of any of the operations of embarking or disembarking; (2) that the carrier was not liable if he proved that he and his agents had taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures; (3) that in the carriage of passengers the liability of the carrier for each passenger is limited to the sum of 125,000 francs; (4) that the passenger renounced for himself and his personal representatives all claims against the carrier for damage caused by injury to himself during the carriage other than claims for damage expressly provided for in the conditions. The whole of these conditions are conditions which all members of the International Air Traffic Association have undertaken with each other to apply to all carriages internal and international. But where the carriage is international there is a further obligation resting on the carrier to carry on these conditions and no others. The conditions are set out in the articles of the Warsaw Convention and the countries parties thereto are under an international obligation to enforce them by law, an obligation which the United Kingdom has carried out by passing the Carriage by Air Act, 1932. In fulfilment of the Convention this Act makes the liability and the limitation of liability laid down in these conditions operate to the exclusion of any other claim which might otherwise be made under any other Act, including, in the case of death, claims under the Fatal Accidents Act 1846. The result of this is that if the death of a passenger occurs as a result of an accident to the aeroplane in circumstances, as in the present case, where the carrier was unable to show absence of fault on the part of himself and his personnel, the representative or relative of the deceased could recover as damages 125,000 francs and no more. The Act of 1932 itself specifies the persons who can claim where a passenger is killed in an "international carriage": they are the same classes of persons as can claim where the Fatal Accidents Act applies.

Where the carriage is internal, however, the position is different, because the Convention does not apply and the general conditions have not been given by statute any special force. In these circumstances claims under the Fatal Accidents Act by relatives of the deceased are not excluded. The relatives, however, can only make a claim under that Act if the deceased could have made one against the carrier if he had remained

alive, and therefore can make no claim if the deceased had by contract excluded all claim by himself in the circumstances of the case. If the deceased had not done this, the relatives can claim under the Fatal Accidents Act for damages suffered by them as a result of the death of the deceased, due to any "act, neglect or default" of the carrier. All the judges in this case agreed, however, that the "act, neglect or default" referred to in the Act covered not merely defaults which were torts but also a breach of a contractual duty to use care. In this case the contract had excluded liability in tort but, according to the view taken by Greer L.J. and Lewis J., had not excluded liability in contract for default; therefore the relatives could claim under the Fatal Accidents Act. It has been held, however, in previous decisions on this Act, that a limitation of the amount of damages in the contract made by the deceased does not limit the amount of the claim of the relatives under the Fatal Accidents Act, although a total exclusion of liability by the contract defeats their claim. Consequently, in accordance with the view taken by these two Judges, who held that the carriage was not international, the relatives in this case could claim all the damages which they had suffered by the death, which were valued in the Court of First Instance at £3,500 for the plaintiff, the widow, and £500 for her daughter.

Greene L.J. in the Court of Appeal, who expressed his view on this point in case he should be overruled on the question of internal as against international carriage, took a different view, holding that the effect of the clauses of this contract was to exclude any contractual duty to use care, a duty which would have to be appreciated with reference to some legal system and therefore involve conflicts of laws. They therefore deprived the deceased, if he had been alive, and, secondly, his relatives after his death, of any claim for damages for any breach of any such contractual nature, substituting therefore a contractual claim of an insurance nature to recover a limited sum of money if an accident occurred and the carrier could not prove that he and his agents had taken all necessary measures to avoid the damage (or that it was impossible for him to take such measures), and that consequently no claim under the Fatal Accidents Act would lie at all.

The immediately following case is another decision on the construction of the Warsaw Convention. The digest of the case makes the point sufficiently clear and no further comment is required.

Case No. 6. Westminster Bank, Ltd. v. Imperial Airways, Ltd. 52 T.L.R. 607 (Lewis J.).

The plaintiffs entrusted to the defendants for carriage from London to Paris three bars of gold valued at £9,138 13s. 6d. The gold was stolen from the defendants' strong-room at Croydon aerodrome, and the plaintiffs now claimed the full value of the gold from the defendants.

The contract of carriage was contained in an air consignment note, which stated that the goods to be carried were "Bar Gold, £9,000" and on the back that "the general conditions of carriage of goods are applicable to both internal and international carriage. These general conditions are based on the Warsaw Convention of October 12, 1929 in so far as concerns international carriage within the meaning of that Convention". The charge paid for the carriage was one arrived at by application of the defendants' *ad valorem* rates for the carriage of gold bullion and specie, i.e. the defendants' ordinary rate for the carriage of goods of this kind. The defendants had ordinary rates for the carriage of general merchandise and also ordinary rates for the carriage of various special kinds of merchandise (including gold) on an *ad valorem* basis.

It was admitted by both sides that the carriage in this case was "international" and that therefore the Carriage by Air Act 1932 and the articles of the Warsaw Convention scheduled thereto applied. The "general conditions" reproduced the relevant articles of the Warsaw Convention. Under Article 18 of the Convention "the carrier is liable for damage sustained in the event of the . . . loss . . . of any goods if

the occurrence which caused the damage took place during the carriage by air" and the "carriage by air" is defined for this purpose as including "the period during which the . . . goods are in charge of the carrier whether in an aerodrome or on board an aircraft . . ." Therefore the loss of the gold occurred during the carriage by air.

The defendants contended (a) that under Article 20 of the Convention "the carrier is not liable if he proves that he or his agents have taken all necessary measures to avoid the damage or that it was impossible for him to take such measures", and they had taken all possible measures and were not therefore liable to pay any damage; alternatively, (b) that under Article 22 (2) the liability of the carrier for goods was limited to the sum of 250 francs per kilogram unless the consignor had made, at the time when the package was handed over to the carrier, a special declaration of the value for delivery and had paid a supplementary sum, and that no such special declaration had been made or supplementary sum paid, and in consequence the defendants were not liable to pay more than 250 francs per kilogram damages.

It was held in this case that there had been no such special declaration or payment.

The plaintiffs, however, contended (a) that Article 9 of the Convention (and the "general conditions") provided that if the carrier accepts goods without an air consignment note having been made out, or if the consignment note does not contain all the particulars set out in Article 8(a) to (i) and (q) inclusive, the carrier shall not be entitled to avail himself of the provisions excluding or limiting his liability, and that Article 8 (q) provided that the air consignment note should contain the following particulars:

"A statement that the carriage is subject to the rules relating to liability established by the Convention;"

(b) that the air consignment note issued did not contain the particulars required by (q) of Article 8 since the statement that the carriage was under the "general conditions", and that these conditions were based on the Convention in the case of international carriage was not the same thing, and in any case the conditions themselves stated that the consignment note should contain the particulars set out in Article 8 of the Convention; (c) that in consequence the defendants were not entitled to rely on the exclusion of liability under Article 20 or the limitation of liability under Article 22.

Lewis J. held that the plaintiffs' contention as regards the consignment note was well founded and gave judgment for the plaintiffs for the full value of the gold.

The Njegos (Case No. 7) is a case where the question for decision was the law to be applied to determine the obligations of the parties to a contract for carriage of goods by sea—where, as so often in shipping cases, the facts of the case involved many countries and nationalities. In this case the decision was against the law of the flag and in favour of the English law, although in the case of this contract English law was neither the *lex loci contractus* nor the *lex loci solutionis* nor the law of the countries in which either the shipowners or the cargo-owners lived, on the ground that the Bills of Lading were in English and incorporated the provisions of a Charter Party which admittedly was governed by English law. The *ratio decidendi* is similar to that in the *Adriatic*¹ where the law of the flag was also rejected.

Case No. 7. The Njegos [1936] P. 90. Sir B. Merriman P.

The *Njegos*, a Yugoslavian vessel, was chartered by X, an Argentine company, to carry a cargo of grain, loaded by X in the Argentine, to Scandinavian ports. The Charter Party was signed in London by an English company as agents for the owners of the *Njegos*, and by the London branch of a Paris firm as agents for X. The Charter Party was in English and in the standard River Plate form ("Centrocon") of the London Chamber of Shipping and contained the usual English arbitration clause.

¹ [1931] P. 241: *B.Y.B.*, 1932, pp. 174 and 184.

It was admitted that the Charter Party was governed by English law as the "proper law of the contract". The Bills of Lading for the cargo were in favour of X or X's assigns and were endorsed in favour of certain Norwegian and Danish merchants to whom the property in the cargo thus passed. The Bills of Lading were in English. They used English weights and measures and fixed the freight in sterling. They further incorporated as conditions of carriage between the shipowner and the owners of the cargo "all the terms, conditions, and exceptions, including the negligence clause, of the Charter Party". After the cargo had been loaded, a fire broke out in the vessel when in the port of Buenos Aires, and part of the cargo was damaged and a quantity was short-delivered.

The Norwegian and Danish merchants as plaintiffs now claimed against the Yugoslavian shipowners as defendants damages for short delivery of the cargo.

The defendants relied on a clause in the Charter Party exempting them from liability for loss or damage caused by fire from any cause occurring, or by latent defects in the appurtenances of the ship, even when occasioned by negligence of the master, crew, or servants of the shipowners, and counterclaimed from the plaintiffs for contribution in general average payable under another clause of the Charter Party in accordance with the York-Antwerp Rules of 1924 on account of expenditure and sacrifices incurred for the common safety of ship and cargo in putting out the fire and unloading the cargo.

The plaintiffs contended that the contract of carriage contained in the Bill of Lading was governed by English law as the proper law of the contract and that under that law the defendants were not entitled to rely on the exceptions protecting them from liability to the cargo-owners, if the ship was not "seaworthy", and that this ship was not seaworthy.

The defendants contended that the contract of carriage was governed by Yugoslavian law, the law of the flag, under which there was no absolute warranty of seaworthiness of the ship but only an obligation to use diligence to keep the vessel in a seaworthy condition, and that they had exercised such diligence and were in consequence entitled to rely on the exceptions in the Charter Party incorporated in the Bill of Lading.

The question whether the contract of affreightment under the Bill of Lading was governed by English or Yugoslavian law was set down for decision as a preliminary point. It was not contended by either side that any other law (*viz. lex loci contractus* or *lex loci solutionis*) applied.

Held (1) that the arbitration clause in the Charter Party was not incorporated in the Bill of Lading and therefore it could not be contended that English law applied on this ground, though the contention would have been irresistible if the clause had been so incorporated.¹

(2) That in the case of a contract by Bill of Lading between a shipowner and consignees of the cargo, there is no valid reason for attaching importance to the *lex loci contractus* or *lex loci solutionis*. In fact consignees to whom Bills of Lading are endorsed probably do not know, until they have already become parties by endorsement, the terms of either the Charter Party or the Bill of Lading, where they have been signed, or by what law either is governed or the flag of the ship on which the goods will be carried.

(3) That any general presumption in favour of the law of the flag in this case was displaced by the fact that the Bill of Lading incorporated certain clauses of the Charter Party, and the Charter Party was governed by English law and not by the law of the flag; that to incorporate these clauses without the law which interpreted them would be possibly to give them a different meaning and effect in the Bill of Lading from that which they possessed in the Charter Party; and that business efficacy pointed to English law governing the contract created by the Bill of Lading

¹ See, however, footnote to Case No. 2 on p. 215 above.

as well as the Charter Party, and the parties must be presumed to have intended the law to apply which was most conducive to business efficacy.

The next case (No. 8) *Ruby Steamship Corporation Ltd. v. Commercial Union Assurance Company*¹ arises out of a very complicated set of facts. For the present purposes it is sufficient to state that policies of insurance on a British ship which was lost were issued by English underwriters (the defendants) in favour of a Canadian company (the plaintiffs) who were interested in the ship, under an agreement to purchase. The policy was effected by instructions given by the plaintiffs to an insurance broker in the United States, who in turn instructed an English insurance broker, who procured the policy from the defendants. The premiums necessary were in fact never paid, but the policy contained a clause by which the underwriter acknowledged the payment of the premium, and, under English law, the effect of this clause, where the premium has in fact not been paid, is (i.e. in a purely English transaction): (i) to create a debt for the amount of the premium from the broker to the underwriter and from the assured to the broker; (ii) to preclude the underwriter from claiming the premium from the assured or from cancelling the policy on account of non-payment; (iii) that the broker cannot cancel the policy by agreement with the underwriter without the consent of the assured.

In American law the position is different. In a purely American transaction the broker never incurs any contractual liability towards the underwriter for the premium on a policy. The latter looks to the assured. The broker has no further interest or duties after he has effected the policy, and therefore the question whether the policy can be cancelled for non-payment of the premium is one between the underwriter and assured only.

The question here, however, was what was the position when an American broker effected, on the instructions of a Canadian assured, an insurance in England through an English broker, and the English broker being liable for the premium to the underwriter looked to the American broker for the premium, who in turn must look to the assured, and the assured failed to pay the latter. In this case the American broker had purported to cancel the policies, so that the plaintiffs could not claim on the policies against the defendants, and the question was whether he had the right to do so. In order to determine this question it was first necessary to ascertain what law applied to govern the relations in this case between the American broker and the Canadian assured, and the Court of Appeal held it was United States law, applying the principle stated in Rule 179 of Dicey's *Conflict of Laws*, 5th ed., p. 724: "An agent's authority as between himself and his principal is governed by the law with reference to which the agency is constituted, which is, in general, the law of the country where the relation of principal and agent is created."

It was then held on the evidence of United States lawyers and of the decisions of the two United States Federal Courts which had already rejected claims by the assured against the American broker for wrongful cancellation of the policies, that the American broker possessed this right.

In the number of the *British Year Book* for 1929,² it was pointed out that recent decisions of the English courts had tended to establish the following rules as being rules to which no exception existed:

1. The domicile of a wife is the same as the domicile of her husband, whether or not the parties are living apart under a decree of judicial separation or by reason of a desertion of the husband, and whether or not the husband has changed his domicile since the date of the marriage;

2. The English courts will only assume jurisdiction in divorce where the domicile of the married pair in accordance with Rule 1 is in England, and will only recognize a foreign decree of divorce if the domicile is in the foreign country in question or if the decree is one which the courts of the foreign domicile would recognize.

¹ 50 L.T.R. 38 (C.A.).

² At p. 246.

It was pointed out that supposed exceptions to these principles which rested on dicta in *Armitage v. Armitage* and *Ogden v. Ogden* must now be considered to be overruled by reason of the decisions heard in *The Lord Advocate v. Jaffrey* in 1921, *The Attorney-General of Alberta v. Cooke* in 1926, and *H. v. H.* of 1928. The last-mentioned case disposed of a doctrine under which it was supposed that "the courts may by estoppel or like device ensure that" a husband who has deserted his wife or been judicially separated from her and has then gone to a foreign country and acquired a domicile there "should not resort to a jurisdiction other than that in which both were domiciled and invoke its powers to change the status of the spouse left resident in the original place of domicile".

*Herd v. Herd*¹ (Case No. 9) simply reaffirms what was decided in *H. v. H.* The only difference between the two cases was that in the earlier the husband was represented and alleged his change of domicile and disputed the jurisdiction of the English courts, whereas in *Herd v. Herd* he took no action. This fact, however, was held to make no difference, since it was the duty of the petitioner to satisfy the English court that it had jurisdiction, and the duty of the English court to insist on being so satisfied before it made its decree, and where it appeared that the husband was not domiciled in England the court must hold it had no jurisdiction whether or not the husband appeared and contested the jurisdiction.

The next case (Case No. 10) deals with the effect of a foreign divorce on an order for the maintenance of a wife previously made by an English court.

Case No. 10. Metzger v. Metzger. 53 T.L.R. 18 (Divisional Court).

Metzger was a German national born and domiciled in Germany. He married his wife in 1928 in New York. They then became resident in England for business reasons. In 1932 they separated and in 1935 the wife obtained from a court of summary jurisdiction in England (competence in the matter being based on residence) an order for the payment of a weekly sum by way of maintenance by her husband on the basis of desertion. In January 1936, Metzger obtained a divorce from his wife in a competent German court, the wife appearing and contesting the proceedings. The grounds for the decree, namely, insulting behaviour and incompatibility of temper, were not grounds which would support an application for divorce in England (in the case of persons domiciled there). In June 1936, Metzger applied to the English court of summary jurisdiction for a discharge of the maintenance order on the ground that he was no longer the husband of his former wife. The English magistrate refused the application on the grounds:

(i) That it had been held in *Bragg v. Bragg* that, in the case of parties domiciled in England, an English decree of divorce obtained by the wife, in which no order for the payment of alimony had been made or applied for but where an application for alimony could still be made, did not have the effect of discharging an earlier decree in favour of the wife for maintenance on the basis of desertion; there was, therefore, *a fortiori* no reason why a foreign decree should have this effect, when that decree, although obtained by the husband, was not based on adultery or any ground which would in England support a divorce or an application for the discharge of a maintenance order;

(ii) That in the exercise of their discretion on the question whether in the new circumstances the maintenance order should be discharged, they were entitled to take into account the fact that the wife, having no means, would, if not maintained by Metzger, become a charge upon the public funds.

Metzger appealed to the Divisional Court.

Held (i) That the German decree, being a decree of a court of the domicile, must be recognized in England as dissolving the marriage, and it was immaterial for this

¹ [1936] P. 205.

purpose whether it was or was not made on grounds which would support a divorce in England;

(ii) The parties having ceased to be husband and wife there was no basis for maintaining an order for maintenance of the former wife by Metzger;

(iii) The decree of divorce being a foreign one, application could not be made to any English court for alimony, and the position was not the same as in *Bragg's* case where the question was whether it was more convenient to allow the English court of summary jurisdiction to decide whether to maintain a former order for maintenance or to compel the wife who had brought successful divorce proceedings in England to apply for alimony in the Divorce Court.

In the case of *North v. North*¹ (Case No. 11) a petition was before the English courts for the dissolution of a marriage which had been celebrated in Belgium. It being necessary for this purpose to prove the marriage in Belgium, a certified copy, issued by the office of the Civil Registry at Antwerp, of the Register of Marriage was admitted as being adequate for this purpose. The acceptance of this certificate as evidence was rendered possible by the Evidence (Foreign, Dominion, and Colonial Documents) Act, 1933, and the Evidence (Belgium) Order, 1933, made under that Act. The Order in Council was made to give effect to an international agreement between the United Kingdom and Belgium under which officially certified copies of a number of specified official documents issued by the authorities of one country were to be accepted as evidence by the courts and authorities of the other country. This procedure saves much time, trouble, and expense to litigants, and but for it the petitioners in this case would not only have had to produce legalized copies of the certificate of marriage, but also to call upon an expert on Belgian law to inform the court as to the nature of the Belgian certificate produced. This is believed to be the first reported case where this procedure has been used in the courts of this country.

Case No. 12. *In re Liddell's Settlement Trusts*² throws light on the powers and practice of the English courts with regard to the custody of children—with particular reference to cases where children are removed from England to a foreign country.

Mr. and Mrs. L. were both domiciled and ordinarily resident in England and had four infant children. Mrs. L. without the consent of her husband removed the children to the United States. Under English law the father has the primary right to the custody of the children, but if the question of custody is brought before a court (it is generally a court of summary jurisdiction) the court may make orders with regard to custody at its discretion exclusively in the interests of the children, and the father then has as such no better claim than the mother; the mother can moreover by her will appoint a third person as guardian of her children, who then has equal rights with the father.³ Mr. L. desiring to recover the custody of the children took the necessary steps, by making a settlement and appointing trustees, to get the children made "wards of court"—this is the technical procedure for invoking the Chancery Division of the High Court in a matter of custody of children. He then, in proceedings brought nominally against the trustees, obtained an order for the return of the children to England including an order (mandatory injunction) directed to Mrs. L. to bring them back to England. This order was, by leave of the court, served on Mrs. L. in the United States, this service abroad being within the English rules with regard to service out of the jurisdiction because Mrs. L. was ordinarily resident in England and the order was one issued in proceedings

¹ 52 T.L.R. 380.

² 1936 1 Ch. 365 (C.A.).

³ It is presumed that the English courts would apply the English rules as to guardianship to children domiciled in England (*query* however whether, by way of exception to the ordinary English principle, nationality is not taken account of in the matter of guardianship) and in the case of children domiciled abroad would apply the rules of the foreign domicil. The *Monaco* case which will be reviewed next year points to this conclusion.

already properly instituted in this country. Mrs. L.'s appeal to the Court of Appeal for the revocation of the mandatory injunction, on the ground that according to the practice of the English courts such orders were not made against persons outside the jurisdiction because they were orders *in personam* and could not be enforced against a person abroad, was rejected on the ground that the mandatory injunction need not be necessarily inefficacious. It could not be assumed that Mrs. L. would disobey it. A writ of sequestration had been issued which would be executed against her property in England if she continued to disobey the order and in any case the injunction could be enforced against her personally if she ever came within the jurisdiction.

Case No. 13. *In re Liddell-Graingers Will Trusts*,¹ is another decision showing how little weight is attached to express statements, whether in wills or elsewhere, by persons as to their intentions to reside permanently in a certain place when the courts have to decide the question of domicil. This case may be compared with *Ross v. Ross*,² and *Attorney-General v. Yule*.³

Case No. 14, *The Beldis*,⁴ is a decision throwing further light on the rules of English private international law which determine the cases in which the English courts claim jurisdiction. As is well known, in the ordinary class of action (often referred to as actions *in personam*) the English courts claim jurisdiction in the first place whenever the defendant can be found within the territory and personally served with the writ there. (As a matter of history this rule originates in the old, long obsolete procedure under which a defendant was arrested personally at the commencement of the proceedings.) Secondly, there are a number of rules determining the cases when the English courts can entertain an action, although the defendant is abroad. These rules take the form of specifying the conditions under which the court may give leave to serve the writ on a person who is abroad. In addition to this, however, there are a number of types of action, whose common feature is that they all relate in some way to ships and fall within the sphere (not in all cases exclusively) of the Admiralty division of the High Court or of County Courts possessing Admiralty jurisdiction (formerly the jurisdiction of the old Court of Admiralty), where an alternative procedure is available. This procedure consists in taking out a writ against the owners of — (a certain named ship present in an English port⁵). The owners of the ship may then appear and defend the claim and obtain the release of their ship by depositing security (bail). If they do so, they are personally liable for the full amount of any judgment given against them even if it exceeds the amount of the security. If they do not appear, the ship is arrested and may be sold to satisfy the judgment. In this way in this class of actions the English courts claim jurisdiction based on the presence within the jurisdiction, not of the defendant personally, but of a ship or cargo belonging to him. This procedure is known as an action *in rem* because judgment may be executed against the ship or cargo (*res*), and if it is sold to satisfy the judgment the purchaser acquires a title which is valid in England against all persons, and therefore it behoves any one who claims an interest in the ship, other than the defendants who are cited as owners, to come and establish their claims in the proceedings. In this class of actions it is always possible as an alternative course to proceed in the ordinary way by action *in personam* against the defendant if he is within the jurisdiction, and in some cases the procedure *in rem* is only available if the shipowner is domiciled abroad.⁶ If the defendant shipowner or cargo-owner is not within the jurisdiction, however, it would not in many of these cases be possible under the English rules to proceed against him *in personam* by getting leave to serve him outside the jurisdiction,

¹ 53 T.L.R. 12.

³ 145 L.T.R. 9.

² [1930] A.C. 1: *B.Y.B.*, 1931, p. 196.

⁴ [1936] P. 51 (Court of Appeal).

⁵ It may also be the cargo, or a portion of the cargo of a ship, or the proceeds of a sale of a cargo, &c.

⁶ Whether the shipowner is defendant or whether he is plaintiff and wishes to proceed *in rem* against the cargo—see *The Eskbridge* (*B.Y.B.*, 1932, p. 184).

and therefore in this class of action the presence of a ship or cargo within an English port brings the matter within the jurisdiction of the English courts when it would not otherwise have been so.¹ This Admiralty procedure of action *in rem* is available for the enforcement of claims for salvage, damages by collision, towage, and bottomry. In these cases the claim creates what is known as a "maritime lien" on the ship or cargo which remains attached to the ship, &c., in favour of the claimant even though it may have lawfully passed to a different owner, and in these cases the action *in rem* takes the form of enforcing the maritime lien. But the procedure by action *in rem* is not confined to cases where there is a maritime lien. It extends also to claims for the supply of necessities to the ship, for wages, claims under any agreement for the carriage of goods in a ship, and, though curiously enough only where the action is brought in a County Court, to any claims under a Charter Party.

In the present case the plaintiffs had a claim against the owners of the s.s. *Beldis*, a Norwegian company who were outside the jurisdiction, in respect of overpayment for freight under a Charter Party affecting another ship belonging to the Norwegian company, the s.s. *Belfri*. The claim had been referred to arbitration in accordance with a clause in the Charter Party and an award for a certain sum of money had been given in favour of the plaintiffs. Desiring to enforce payment of the sum of money due under the award, the plaintiffs took out a writ *in rem* in a County Court having Admiralty jurisdiction against the Norwegian company as the owners of the s.s. *Beldis* (i.e. not the ship which was subject to the Charter Party which gave rise to the claim but another ship belonging to the same owners). But it was held by the Court of Appeal (1) that a claim on an arbitral award, even though the arbitral award was given in respect of a dispute arising out of a Charter Party, was not a claim to which the Admiralty procedure of action *in rem* was applicable in the County Court as being a claim arising out of a Charter Party, and (2) that in any case it was not permissible to arrest by a writ *in rem* a ship which was unconnected with the cause of action, even though it belonged to the same owners, as a ship which was connected with the cause of action.

In fact, in the present case the owners of the vessel never appeared at all, but the objection was taken by another party which had a mortgage upon the vessel which had been arrested.

Upon the petition of a creditor, a person may be declared a bankrupt by the English courts if (a) he is (according to the English rules) subject to the English bankruptcy laws, and (b) has committed an act of bankruptcy. The English rules make a person of any nationality subject to the English bankruptcy laws if (i) he was personally present in England when the act of bankruptcy occurred, or (ii) he was ordinarily resident or had a place of residence in England, or (iii) was carrying on business in England personally or through an agent or manager.

There are various acts which constitute acts of bankruptcy, including the assignment by the debtor for the benefit of creditors of the whole or substantially the whole of his property. It is not material whether this assignment is executed in England or abroad but it was decided in *In re Debtors*² (Case No. 15) by the Court of Appeal that the assignment, in order to operate as an act of bankruptcy, must be an assignment intended to "operate according to English law" (i.e. to assign property situate in Eng-

¹ In Scotland and a number of foreign countries the presence within the jurisdiction of property of any kind belonging to the defendant which can be arrested is a ground for claiming jurisdiction. This has never been the case in England as regards the common law courts or the courts of equity. In the Admiralty Court, originally the presence of the defendant or of any property of his which could be arrested "within the jurisdiction of the Admiral", i.e. in a port or harbour, was held to give the Admiralty Court jurisdiction, but arrest of the defendant personally in Admiralty jurisdiction has been long obsolete and so has the arrest of property of any kind, the procedure now being confined to ships, cargoes and the proceeds thereof, freight, &c.

² [1936] 1 Ch. 622.

land) and that an assignment, executed abroad by a debtor resident abroad but who carried on his business in England through a manager, which operated only according to the law of the debtor's domicile (i.e. affecting only his property there), was not an "act of bankruptcy" which would found a bankruptcy petition in England.

The judgment of the Court of Appeal in Case No. 16, *St. Pierre v. South American Stores*,¹ illustrates the two following principles:

(1) That, though the English courts have no competence to entertain actions relating to land situated abroad (i.e. actions involving the title to such land or the right to possession thereof), this principle does not exclude personal actions arising out of contracts relating to land, such as actions for rent or damages under a contract of lease (as in the present case) or for payment of interest under mortgage;

(2) That, where an action is brought which the plaintiff has the right to bring before the English courts (as opposed to cases where the court has a discretion to permit or refuse to entertain it²), the English court can under Section 41 of the Judicature Act, 1925, order the action to be stayed on the ground that it is vexatious and oppressive and an abuse of the process of the court, but in order to obtain such a stay the defendant must show (a) that the stay would not cause any injustice to the plaintiff; and (b) that to allow the proceedings to continue in England would cause such difficulties to the defendant as to amount to an injustice, difficulties to which he would not be subject if the proceedings were brought in some other country where they can be brought. It is not sufficient to show that the case can be more conveniently tried abroad.

If, for instance, the plaintiff has instituted proceedings abroad in respect of the same matter, then in accordance with (a) and (b) above, the plaintiff will generally be put to his election to abandon either the English or the foreign proceedings, or alternatively the English proceedings may simply be stayed at once. But the fact that the defendant in England has sued the plaintiff in England abroad in respect of the same matter is not alone sufficient to allow the English courts to stay the English proceedings and deprive the plaintiff in England of his right to sue there.

The second of these two principles has already been discussed in previous numbers of the *Year Book*³ in connexion with the cases of *The Janera*⁴ and *The London*⁵ where it is pointed out (i) that in England the question of *lis alibi pendens* is dealt with under this power to stay vexatious actions and is treated in this way, and (ii) that it is only where the English courts have a discretionary power to entertain or refuse to entertain an action because leave to serve out of the jurisdiction has to be obtained, that full account can be and is taken of the plea of *forum non conveniens*, and the fact that other proceedings in respect of the same matter are being brought abroad may support a plea of *forum non conveniens* in circumstances when it would not support an application to stay an action brought as of right.⁶ Lord Justice Scott in the *South American Stores* case (at page 398) pointed out this distinction between cases where it is sought to stay an action brought as of right, on the one hand, and cases where leave is sought to bring an action on the other.

In the present case the defendants sought to have an action stayed which was brought as of right because the defendants had an office in London and could be served there. This action was for rent and dilapidations in respect of land and buildings in

¹ [1936] 1 K.B. 382.

² i.e. where the defendant is resident in England and can be served with the writ there as opposed to cases where the writ has to be served abroad and the leave of the court has to be obtained under one of the rules relating to service out of the jurisdiction.

³ 1929, pp. 248 and 259; 1932, pp. 173 and 183.

⁴ [1928] P. 55.

⁵ [1931] P. 14.

⁶ Cases where the English courts have exercised their discretion to refuse to allow service out of the jurisdiction on the ground of *forum non conveniens* will be found discussed in the *Year Book* for 1935. 1926, p. 223 (*Roster v. Hilbery*); 1930, p. 237 (*Robinson v. Speakman*); 1935, p. 213 (*Goff v. Goff*).

Chile under a lease governed by Chilean law signed at Paris between *de Béeche* as lessor (the plaintiffs were his executors) who was resident in France and the defendants, English companies with registered offices in London whose business was conducted exclusively in South America. According to the lease the rent was fixed in Chilean pesos of a specified gold value and was payable in Europe if the lessor so demanded, as he had.

The dispute turned entirely on the effect on the obligations of the defendant to pay rent of two recent Chilean laws for the protection of the currency. It had already been decided in England with the force of *res judicata* for these parties that these laws made it illegal and impossible for the defendants to pay the rent in accordance with the exact terms of the contract.¹ It remained to be decided whether these laws permitted the defendants to discharge their obligation by paying in Chile an equivalent number of paper pesos as the defendants contended. The defendants had started proceedings claiming a declaration in this sense from the Chilean courts and had deposited the sum in paper pesos in the Chilean courts.

The issue arose therefore out of a Chilean contract and turned on the law of Chile exclusively. It was, however, a question which *could* be decided by the English courts upon the evidence of Chilean lawyers and it was held that the defendants had failed to establish grounds justifying the court in staying the action as oppressive or vexatious, though if the matter had been one where *forum non conveniens* could be made the basis of the decision, there is no doubt but that convenience pointed to the Chilean courts.

E.

¹ [1935] A.C. 149: *B.Y.B.*, 1936, p. 215.

REVIEWS OF BOOKS

Académie de Droit International: Recueil des cours, 1935. Vols. 51-4 of the series.
Paris: Sirey.

In the 23 courses of lectures and the 2,674 pages of these volumes most of the questions which are exercising contemporary international lawyers are touched upon somewhere or other. Denial of justice, the general principles of law, statelessness, *rebus sic stantibus*—these are only some of the topics which come up for discussion again and again in different connexions.

In Vol. I M. Sfériadès (*Le Problème de l'accès des particuliers à des juridictions internationales*) pleads once more for the general admission of individuals as parties to actions against states, showing the dangers and injustices which are inseparable from the present practice of exclusion. M. Janouloff (*Législation internationale du travail*), while feeling that the attitude of governments to the International Labour Organization is at the best one of regrettable indifference, sees a steady movement towards making the Organization an international clearing house of social and economic information. M. Negulesco expounds the *Principes du droit international administratif* which he distinguishes from those of *droit international public*, based on the theory of public service, and also from those of *droit administratif international*, which he describes as the field of international activity of internal state organs. The other courses are on private international law. M. Hamel (*Les Formes internationales des crédits bancaires*) argues that, despite the contrary opinion expressed at the Congress of Comparative Law in 1931, the law of bankers' credits has reached a sufficient degree of international uniformity to make partial codification practicable. M. Diena (*Principes du droit international privé maritime*) also makes suggestions for adoption in any future revision of international maritime law with a view to the formulation of uniform rules. M. Pallieri (*L'Arbitrage privé dans les rapports internationaux*) rejects the theory of the jurisdictional character of private arbitration and concludes that the private international law applicable must be substantially that relating to contracts. M. de Balas, turning to international politics (*La Politique commerciale en Europe centrale*), holds out little prospect of re-establishing the economic unity which must somehow be made compatible with the political separation of the states created out of the old Austro-Hungarian Empire, until a sound monetary system has been adopted by them.

In Vol. II M. Borel (*Les Voies de recours contre les sentences arbitrales*) argues convincingly that the prestige of international arbitration depends on the existence of some tribunal to which recourse may be had in certain specified cases from arbitral courts, and that this tribunal can be none other than the Permanent Court of International Justice. M. Pusta brings up to the present day the study of the international status of the Baltic begun by M. de Taube in Vol. III (*Le Statut juridique de la mer Baltique*). M. Verdross restates in a somewhat different form what he has said elsewhere on *Les Principes généraux du droit dans la jurisprudence internationale*. He seems to be moving towards the position that these principles are a new law of nature or "higher" law invalidating any conflicting rules of positive law. In his interesting study of *La Notion de réciprocité dans les traités diplomatiques de droit international privé* M. Niboyet makes it clear that the reciprocity stipulated for in treaties often proves more apparent

than real. M. De Visscher (*Le Dénî de justice en droit international*) traces the gradual extension of the concept of denial of justice and defines it as meaning "any defect in the organization or exercise of the jurisdictional (not merely 'judicial') process which involves a failure of the state in its duty to protect foreigners". M. Messina (*Le Plagiat littéraire et artistique dans la doctrine, la législation comparée et la jurisprudence internationale*) surveys a province where law and art meet. M. Martin in a closely reasoned paper (*Une Conception nouvelle de l'empire de la loi locale par opposition à la loi personnelle et à la loi territoriale*) holds that a third class—acts depending upon professional status—must be added to the two—torts and the forms of transactions—which have hitherto been regarded as governed by the *lex loci*.

In Vol. III M. Orue y Arregui (*Le Régionalisme dans l'organisation internationale*) welcomes the tendency—grown stronger since this course was given—towards regionalism in international relations. Nothing approaching real universality, he thinks, can be achieved without a frank recognition of regionalism, provided the movement proceeds under the eye of the League and is not exclusive. Dr. Walsh (*Les Principes fondamentaux de la vie internationale*) makes an eloquent plea for the reconstitution of the international community through a return to the principles of Christian conduct. Mr. Fabre-Surveyer's lectures on *La Conception du droit international privé d'après la doctrine et la pratique au Canada*, contain information of interest to English readers. M. François (*Le Problème des apatrides*) discusses the causes of statelessness. He can see no solution of the problem but to remove the conditions from which it results. M. Jèze (*Les Défaillances d'état*) gives a clear account of the ways in which states have repudiated their debts, and creditors have attempted to protect themselves from such an eventuality. The judgment of Branson J. in the *International Bondholders'* case, recently restored by the House of Lords, seems to him decisive and of general application. Mr. Finch (*Les Sources modernes du droit international*), after an historical sketch of the forces which have gone to make international law, gives chapters to the law of nature, custom, treaties, judicial decisions.

Vol. IV is entirely given up to two courses by M. le Fur and M. Kaufmann. Each has the title *Règles générales du droit de la paix* and is in effect a general treatise on international law. If M. le Fur shows himself a little out of sympathy with German theories as such, M. Kaufmann's pages bear the impress of the post-war difficulties which have coloured the German outlook upon international affairs. They come together in their rejection not only of Kelsen's monism but also of the positivism which, as in the *Lotus* case, makes international law the product of the wills of states and admits of no source of rules except treaties and custom. Readers acquainted with an oft-cited passage in an earlier work of M. Kaufmann will turn with interest to the "authentic" interpretation given on p. 522 of the volume under review.

J. W. J.

Collective Security. Edited by Maurice Bourquin. Institute of Intellectual Co-operation, Paris, 1936. pp. 514+xi. 16s. or \$4.

This is a record of the Seventh and Eighth International Studies Conferences held, under the auspices of the League of Nations and the Institute of Intellectual Co-operation, at Paris in 1934 and London in 1935; the record is prepared by Professor Bourquin with the collaboration of Professors René Cassin and Arnold Toynbee. The book is divided into two parts of unequal length—the

first part contains a Report on the Preparatory Memoranda and the text of the Addresses of Welcome (Sir Austen Chamberlain, Professor Eisenmann, and Mr. A. W. Dulles) delivered at the Inaugural Meeting of the London Conference, and the second part gives extracts from the Memoranda and a record of the discussions.

This record will be found invaluable by the student who seeks to understand the various currents of contemporary opinion. The long list of distinguished contributors—delegates, participants, and authors of memoranda—includes names from the large majority of countries of modern civilization, but it seems not to have been possible to obtain representatives of the Far East (Japan and China), of India, America, or of Australia or New Zealand.

J. F. W.

Traitéés politiques: Recueil des documents, publiés par Viktor Bruns, tome i. Traitéés de Garantie, d'Alliance, de Collaboration politique, de Non-Agression et de Neutralité conclus après la guerre: recueillis et annotés par Georg von Gretschaninow. Carl Heymanns Verlag, Berlin, 1936: lii+637 pp.

Professor Viktor Bruns explains in a preface that, pending the publication of the fourth series of the *Fontes Juris Gentium*, which will be devoted to a collection of the articles of treaties, he thought it would be useful to publish at once a volume containing all post-war political treaties and certain other documents relevant to them. Accordingly, under the editorship of Herr Georg von Gretschaninow, this volume collects the texts of all the political treaties, i.e. of arbitration, guarantee, disarmament, non-aggression, &c., concluded since the end of the Great War, together with notes as to ratification, &c., and many related documents, such as, for instance, memoranda and reports of speeches on the question of the incompatibility of the Franco-Soviet Pact with the Locarno Pact. We feel sure that Professor Bruns's decision was right, and it has resulted in the production of a volume which will be found very useful and once more places international lawyers under an obligation to the Institut für Ausländisches Öffentliches Recht und Völkerrecht and its staff.

A. D. MCN.

Art. 5 und Art. 14, Satz 3, der Völkerbundsatzung. By S. Engel. The Hague: Martinus Nijhoff, 1936. pp. 124. 2.50 Gld.

This is a careful discussion by an Austrian scholar of the question whether on the true interpretation of the relevant passages in the Covenant unanimity, qualified or absolute, in the Council or Assembly of the League is necessary for a decision to ask an Advisory Opinion of the Permanent Court of International Justice. The treatise was written as a thesis for the degree of *Docteur ès Sciences Politiques* in the University of Geneva. The conclusion reached is that such decisions may be taken by a majority, the votes of the parties to the dispute not being taken into account.

The question is one of considerable practical importance, but its delicacy is reflected in the obvious unwillingness of the organs of the League to bring it up for decision. If or whenever it is so brought up Dr. Engel's work will be found of great value. All relevant topics appear to be dealt with and there is a full bibliography.

J. F. W.

Some Problems of the Palestine Mandate. By Dr. Nathan Feinberg. Tel Aviv, Palestine.

Dr. Feinberg, who was formerly a lecturer at the University of Geneva and has made a special study of the mandate system, has brought together in this little volume a number of articles on the Zionist problem and the Palestine Mandate contributed by him to reviews during recent years. The book was published in Palestine during the period of unrest, before the Royal Commission began its investigation. It deals particularly with the juridical and historical aspects of some of the questions which the Commission investigated. One of the papers examines the legal status of the Jews at the Peace Conference, another the Arab attitude towards Zionism at that Conference. Two are concerned with the problem of the Legislative Council in Palestine. Dr. Feinberg has an acute legal mind, and has made a careful and exact study of the sources of the Palestine Mandate. In the light of those sources he analyses the provisions of Article 2 of that instrument, which is regarded as laying down the dual obligation, the establishment of the Jewish National Home and the development of self-governing institutions. The former provision is generally considered to be in favour of the Jews, the latter in favour of the Arabs. Dr. Feinberg urges that historically the provision about self-governing institutions was inserted in order to give full effect to the idea of the Jewish National Home, and was in fact a modification of the proposal of the Jewish bodies for the creation of an "autonomous commonwealth". The Article of the Mandate, then, does not stipulate two independent and equal objects, but only one aim. "The development of self-governing institutions is an integral and organic part of the process of the realization of the National Home, and must be effective only in so far as it is in harmony with the upbuilding of the Homeland." The historical origin of the clauses in the Mandate, of course, is of less importance than the practical working of the Mandate; and Dr. Feinberg does not concern himself with the solution of the present grave problems in Palestine. But his studies merit the serious consideration of all who wish to understand the legal basis of the Palestine Mandate and the political and spiritual foundations of Zionism.

NORMAN BENTWICH.

Trattati e Convenzioni Bilaterali fra il Regno d'Italia e gli altri stati. By Dr. Nob. P. van Panhuys Polman Gruys. Leiden: A. W. Sijthoff. 8vo. pp. xii+453.

Dr. Gruys has devoted much time and energy to the compilation of this bilingual index to the treaties and conventions between Italy and other countries which were in force on January 1, 1933. It forms a supplement to the collection of treaties published by the Italian Foreign Office and will be found useful by those who are not familiar with the Italian language.

H. C. G.

Cases and Other Materials on International Law. Edited by Manley O. Hudson. Second Edition, 1936. St. Paul: West Publishing Co. xl and 1,440 pp.

Professor Manley Hudson, assisted by Miss Ruth Bacon, has spared himself no pains in bringing up to date this most valuable collection. It goes without saying that all the more important recent cases and multilateral treaties have been included, but in addition there is a new introductory section on the Law of the Society of Nations. This includes extracts from sources as diverse as

Suarez, Kelsen, the Weimar Constitution, and the judgment of the Privy Council in *In re Piracy Jure Gentium*. The contents of the volume are made more readily accessible by a re-arrangement of the index, which is now in three parts: an index of cases grouped under the international or national tribunals from which they derive, an index of authors, and a subject-index. It must be regretted, however, that the names of cases mentioned but not reported have disappeared from the alphabetical list of cases at the beginning of the volume. This list was often useful and occupied but little space.

B. E. K.

International Legislation: A Collection of the Texts of Multipartite Instruments of General Interest. Vol. V, 1929-31: Edited by Judge Manley O. Hudson, with the collaboration of Miss Ruth E. Bacon. Washington: Carnegie Endowment for International Peace. xlii+1180 pp. (\$4.)

Those who have got into the habit of using the first four volumes of this series will give a warm welcome to this, the fifth, which makes available the texts of multipartite treaties concluded between July 1, 1929, and the end of 1931. It is of great value to have these texts in so small a compass. The *League of Nations Treaty Series* is so bulky that it is not often found outside a public library. Moreover, the careful notes which precede each text in *International Legislation* bring together information as to the occasion of the treaty, its ratifications, and the bibliography which could only be collected after prolonged search. The editor and his collaborator may feel quite certain that the series is fulfilling the double object referred to in the Preface; and that the more they can reduce the gap between the year of publication and the date of the latest treaty included in the series the more grateful international lawyers will be to them and to the Carnegie Endowment.

A. D. McN.

Neutrality. Its History, Economics and Law. By Philip C. Jessup, Francis Déak, W. Allison Phillips, Arthur H. Reede, and Edgar Turlington. New York: Columbia University Press, 1935, and Oxford University Press. 4 volumes. Vol. I, xiv+291 pp.; Vol. II, vi+339 pp.; Vol. III, xi+267 pp.; Vol. IV, vii+237 pp. (14s. net. each volume.)

This is an interesting but disappointing work. A treatise in four volumes entitled *Neutrality. Its History, Economics and Law* suggests a comprehensive survey of the whole field of neutrality. The title is misleading in two respects. In the first place, it is not neutrality as a whole which is dealt with, but only those aspects of it which have reference to the particular case of the exercise of belligerent rights at sea; in brief, problems of blockade, contraband, "free ships, free goods", and certain forms of unneutral service to belligerents. These aspects of neutrality, though of great importance, by no means exhaust the matter. Unfortunately, the preoccupation of the United States with the question of belligerent rights at sea has caused the word 'neutrality' to become practically identified in that country with this aspect of the subject, a tendency which this work, of mainly American authorship, reflects.

Secondly, the title of the work suggests a full discussion of the rules of international law relating to the matters dealt with. Actually, the book is primarily of historical and economic interest. The law is, of course, touched upon; but

there is nowhere any adequate treatment of the purely legal aspects of the various questions raised.

This said, the fact remains that the work is of great, in parts of very great, interest; particularly from the historical point of view. In the first volume entitled "The Origins", Professor Jessup and Mr. Déak trace the early evolution of an international practice in regard to the exercise of belligerent rights at sea. The second volume, in some ways the most interesting of the four, contains a historical study by Professor W. Allison Phillips of the exercise of belligerent rights at sea during the Napoleonic period; and a useful study by Mr. Arthur H. Reede of the economic effects of the measures taken. From this volume it emerges very clearly that few of the situations or practices of the war of 1914-18 were really new, nor were the arguments used by neutrals and belligerents in defence of their respective positions. The third volume, by Mr. Edgar Turlington, deals with the war of 1914-18 and contains a detailed account of the measures taken by the Allies against the commerce of the Central Powers, and of the effect produced on the trade and interests of neutrals, in particular of the United States. This volume too brings out the fact that these measures, and the arguments employed in connexion with them, were by no means so new or revolutionary as may have been supposed.

Finally, in the volume entitled "To-day and To-morrow", Professor Jessup sums up, and discusses the future of the concept of neutrality, with especial reference to the policy of the United States.

G. F.

Jahrbuch der Konsularakademie zu Wien. 1936. 147 pp.

The present issue of the annual publication of the Vienna Consular Academy certainly does not fall below the standard set by its predecessors. In addition to a number of papers in the field of economics and colonial policy, it contains useful contributions on international law. These include articles by Gredler-Oxenbauer on the international status of the Memel Territory, by Ottahal-Ottenhorst on the legal status in international law of the European and International Danube Commissions, and by Sewki Hüsnü Dorsay on the Straits question.

Diplomatic Correspondence of the United States. Inter-American Affairs, 1831-60.

Selected and arranged by W. R. Manning, Ph.D. Vol. VII, Great Britain.

Washington: Carnegie Endowment for International Peace. 1936. 785 pp.

Dr. Manning goes forward with his good work. The present volume, covering Anglo-American correspondence on inter-American affairs, is full of interest. There is much on the question of Texas, and Calhoun expresses himself sharply on the alleged efforts of Lord Aberdeen to assist the abolition of slavery in that state and in the United States. Questions of Britain's territorial claims in Central America, her support of Costa Rica against Nicaragua, and the rights of the United States as being "the dominant power" of the North American continent also give rise to much plain speaking. Another subject which receives a good deal of space is Cuba and the efforts of American sympathizers with the rebels against Spain. There are 455 documents in all, full both of political and personal interest; and a helpful index.

R. G. D. LAFFAN.

Internationales Verwaltungsrecht, Vol. IV. By Karl Neumeyer. 1936. Zürich: Verlag für Recht. 8vo. pp. xii+600. (RM. 32.)

Professor Neumeyer's magisterial treatise on International Administrative Law needs no introduction to those who have followed recent developments in the private international law of the continent. The fourth volume, which is the *allgemeiner Teil*, contains the author's *Credo*. For that reason alone it is of special interest. The existence of a separate branch of the law which can be described as International Administrative Law has been doubted, but there appear to be certain problems arising in the ill-defined sphere lying between municipal and international law which it is difficult to assign to either. These problems chiefly relate to the activities of governmental organs and furnish the material for a treatise which is conspicuous for its systematic arrangement and the profundity of learning which it displays. It is, of course, a difficult book for English readers whose minds have not yet become attuned to the idea of administrative law.

H. C. G.

Die politischen Streitigkeiten im Völkerrecht. By Onno Oncken. (Internationalrechtliche Abhandlungen, herausgegeben von Dr. Herbert Kraus, vol. 29.) Berlin: Verlag für Staatswissenschaften und Geschichte, 1936. 64 pp.

The author joins that increasing school of thought which holds that the "political" nature of a dispute is no bar to its solution by recourse to an arbitral or judicial procedure. He emphasizes that all disputes between states are of necessity political, but that nothing but the reluctance of the parties concerned stands in the way of ascertaining the law applicable to the given situation. A good analysis of the argument that the preservation of independence and of vital interests cannot be entrusted to judicial procedure shows this to be mere camouflage: international law being essentially based on the concept of independence, that and other *lawful* vital interests would be quite safe in the hands of the international judge. The argument is only of importance if intended to cover *unlawful* "vital interests".

In the last few pages, the author attempts to deal with the delicate problem of finding a satisfactory judicial solution of disputes in which one party alleges that the application of strict law would be inequitable. He does not proceed beyond a mere re-statement of the difficulty.

BENJAMIN AKZIN.

Die Österreichische Völkerbundanleihe. By Dr. Arpad Plesch and Dr. Martin Domke. 1936. Zürich: Polygraphischer Verlag A.G. pp. 143.

Drs. Plesch and Domke are too well known to English students of the law relating to the Gold Clause to need any introduction. This work presents a thorough discussion from a comparative law point of view of the problems of interpretation raised by the League of Nations loan to Austria for post-war reconstruction and financial rehabilitation. Those who subscribed to the loan will no doubt be grateful for this effort to put forward a case for the protection of the rights of creditors. The authors are of opinion that the American issue contains a gold-value clause, but they do not agree that the contract amounts to a submission to American law which allows debts to be discharged in paper dollars. Unfortunately since this work was published the Swedish decision of

April 16, 1935, in the *Skandia* case, and the English decision of the Court of Appeal in *The King v. International Trustee for the Protection of Bondholders A.G.* have been reversed by higher courts, and to this extent the author's thesis is somewhat weakened. Whether or not the debtor state would have been willing to pay, say double the value of the original dollars, if American currency had appreciated (see pp. 71-2) is another matter.

The second, third, and fourth chapters of the book deal with ground familiar to English lawyers: the duty of trustees towards their beneficiaries. Quite properly the high trust reposed in every trustee is stressed and applied to the trustees of the present loan in respect of their duties towards the states that have guaranteed the loan. As the author points out (p. 90), even the decision of the Austrian courts allowing the loan to be discharged in paper would not necessarily alter the obligation of the sureties who are sovereign states. But, we may observe, sovereign states can, as we have recently seen, limit their own obligation, despite "the principle of the inviolability of the public debt".

The authors also discuss the question of jurisdiction, and give a copious bibliography: more recently Dr. Domke has developed some of the themes in articles in the *Bulletin de l'Institut Juridique International* (1936, p. 198), the *Revue de Science et le législation financière* (1936), and in the *Nouvelle revue de droit international privé* (1936, p. 20, and 1937, part I).

Throughout, the erudition displayed by the learned authors is most impressive. We have only detected misprints at pp. 88 and 113.

B. A. W.

Il Diritto Internazionale Privato Marittimo ed Aeronautico. By Professor Mario Scerni. 1936. Padova: Cedam. 8vo. pp. viii+368.

This is the sixth volume in the series of books on public and private international law now appearing under the editorship of Professor Prospero Fedozzi. The general scheme of the series embodies an idea which merits serious consideration. International law, and more particularly private international law, is growing so bulky in content at the present time that the institutional work or compendium, if it attempts to be much more than a student's handbook, is apt to become both congested and unwieldy. This tendency, which is due to the many-sidedness of present-day international intercourse, is sufficiently illustrated by the existence in all languages of ponderous tomes which are overcrowded with footnotes and appendixes. In these circumstances the utility of the separate monograph, dealing with a special topic, appears to be beyond doubt, but if proof be needed it will be found in Professor Scerni's admirable examination of the peculiar problems which arise in the case of conflict between the laws of transport by sea and by air. His work will be valuable to all those who wish to ascertain the attitude of Italian law towards such questions, and also to comparative lawyers who will derive much assistance from this well-documented survey of international co-operation in the field of the law of transport.

H. C. G.

Staat und Gebietshoheit. By Dr. Adolf F. Schnitzer. Zürich-Leipzig: Verlag für Recht und Gesellschaft A.-G. 1935.

The publication of this book comes at an opportune moment, and provides a thoughtful and learned solution to the problems of occupation which have arisen

in a very acute form recently. The author's analysis is thorough and covers all the claims, advanced at various times by states, to the right of occupation of disputed territories.

The bibliography is also particularly good, and the volume, as a whole, constitutes a valuable contribution towards the materials for the study of a most difficult subject.

C. J. C.

The League of Nations and World Order. By Georg Schwarzenberger. (Preface by Professor H. A. Smith.) London: Constable & Co., Ltd. xvii+191 pp. (6s. net.)

Justice and Equity in the International Sphere. By Norman Bentwich, A. S. de Bustamante, Donald A. McLean, Gustav Radbruch, and H. A. Smith. (Preface by Professor Harold Temperley.) London: Constable & Co., Ltd. x+59 pp. (4s. 6d. net.)

These two books are part of the series of monographs published by the New Commonwealth Institute. In each case the title is somewhat wider than the scope of the book. Dr. Schwarzenberger's book is more accurately described by the sub-title, "A treatise on the Principle of Universality in the Theory and Practice of the League of Nations"; and the author, who is the Secretary of the New Commonwealth Institute, discusses fully the conceptions of "heterogeneous", "homogeneous", and "relative" universality in the drafting of the Covenant and in the practice of the League. The book gives a full and well-documented account of the difficulties which the absence of important states has caused to the League and the attempts which have been made to deal with these difficulties; the author's general conclusion is that a universal League can only be obtained either by the development of a "common loyalty based upon a common faith" or at any rate an attitude in the minds of responsible statesmen strong enough to induce them to act as if a common loyalty did exist. For this purpose it will be essential to make adequate provision for "peaceful change".

One of the suggestions made for dealing with the problem of "peaceful change" is the establishment of an "International Court of Equity", which forms the subject of several publications issued by the New Commonwealth Institute. *Justice and Equity in the International Sphere*, a collection of essays by five authors, is intended as "an enquiry into the precedents or previous history for material" on which the principles and practice of such a court could be based. The first essay, by Professor Radbruch, is a philosophical discussion of the part which equity can play in international relations; the next three, by Professor Smith, Judge de Bustamante, and Professor Bentwich respectively, discuss the precedents (if they can be regarded as such, since in no case was the court really an "Equity Tribunal" in the sense now in question) of the jurisdiction of the American Supreme Court in inter-state disputes, the Central American Court of Justice and Equity, and the jurisdiction of the Judicial Committee of the Privy Council. Professor McLean's essay on "International Justice and Equity from the Christian Point of View" is little more than a collection of pronouncements by Roman Catholic authorities in favour of peace and justice. The general impression left by the book is that such precedents and material as exist are not encouraging as regards the possibility of the establishment of the contemplated tribunal.

W.

La Rappresentanza nel Diritto Internazionale. By Angelo Piero Sereni. Padua. 1936. xvi+452 pp.

International law shows various situations in which one state is called upon to fulfil functions on behalf of another. Protectorates are a typical example of such a relationship, but Professor Sereni's industry and erudition have shown how very frequently these situations arise and to what interesting problems they give rise. He discusses in detail the questions arising in this connexion in the relations of confederations of states, vassal states and their suzerains, the British Empire, mandates, condominiums, economic unions, and in the various instances of the protection of the citizens of one state by the diplomatic and consular services of another. The first part of the treatise, which breaks new ground in the literature of international law, is devoted to the question of subjects of international law and the theory of representation in general. The book ends with an interesting chapter on the place of *negotiorum gestio* in international law.

H. L.

Handbuch des Völkerrechts—Fünfte Abteilung. Neutralitätsrecht. By Prof. von Waldkirch and Capt. E. Vanselow. Stuttgart: Verlag von W. Kohlhammer. 1936.

This volume constitutes a valuable addition to the standard series of treatises on international law, originated by the late Professor Stier-Somlo.

It is the work of Professor von Waldkirch and of Captain Vanselow and combines, therefore, academical knowledge with the experience of a naval officer, who served during the Great War in the German Admiralty.

An excellent commentary is provided in this work on the main provisions of the two Hague Conferences and of the London Declaration of 1909, with a very full explanation of the way they were applied by the belligerent powers in the Great War. The volume deals with the question of neutrality both on land and on sea, and also with neutrality in the air, in so far as it is connected with naval warfare.

The book is very clear and scholarly and brings the subject of neutrality up to date.

C. J. C.

Geschichte des Völkerrechts. By Arthur Wegner. *Handbuch des Völkerrechts.* Stuttgart: Kohlhammer. 1936. xxxv+362 pp.

This is a scholarly and concise history of international law. The author gives a particularly interesting picture of the Greek and Roman periods and the history of the Middle Ages. He has also paid special attention to the development of the law of the sea. The value of the book is not seriously impaired by the concluding sections on the post-war developments and the League of Nations. These sections abound in passionate denunciation of the Treaty of Versailles. The League of Nations and the Permanent Court of International Justice are treated with a mixture of suspicion and decondescension. But the author's remarks on the significance of the innovation embodied in the composition of the International Labour Organization will well repay reading. On the whole, Professor Wegner's little treatise must be regarded as filling with conspicuous success a serious gap in the German literature on the history of international law. It is also a book of much usefulness for students from other countries.

H. L.

Beiträge zum Problem der internationalen Doppelbesteuerung. Die Begriffsbildung im internationalen Steuerrecht, von Dr. Wilhelm Wengler. Berlin und Leipzig: Walter de Gruyter. 1935. xiv+198 pp.

Fundamental notions of taxation, for instance notions on residence of individuals and bodies corporate, of situs of a thing, of trade or business, of gains or profits, are commonly used in all national systems of law but are not identical in substance. The exact meaning of any one of such notions and the extent to which it differs from a similar notion in another tax system can only be established by comparative study of national tax laws and practice. Professor Harding in his brilliant "study in the judicial determination of the conflicting claims of taxation jurisdiction advanced by the American States" (*Double Taxation of Property and Income*, 1933) states that "it is now declared that double taxation of the *same legal interest or wealth* by two different states on the basis of conflicting theories may, if unreasonable, be opposed to the due process clause".¹ Are any two impositions ordered respectively by two states and bearing the same name aimed "at the same legal interest or wealth"? If they are, we have a case of double taxation; if not, then though both states give the same name to an imposition we have in fact two different taxes. To use the same name to express two different notions, for instance in an international treaty dealing with double taxation, would be inadvisable from the point of view of legal technique (*Rechtstechnisch*), as Dr. Wengler rightly points out (page xiv). Strictly speaking only the complete identity of two impositions would give legal justification for measures to prevent double taxation. Dr. Wengler's book convincingly proves the value of the comparative method of study of taxation. It bears the impress of profound study of tax problems in many national systems of law and is a very valuable contribution to the theory of double taxation.

V. R. IDELSON.

Elements of International Law. By Henry Wheaton. Oxford, at the Clarendon Press. London: Humphrey Milford. pp. 642+xliv+26. 20s. net.

This is a volume (No. 19) in the series of the "Classics of International Law" issued under the general editorship of Dr. J. B. Scott and the auspices of the Division of International Law of the Carnegie Endowment for International Peace; the main contents of the volume are a literal reproduction of the edition of 1866 by Richard Henry Dana, jr., edited with notes by Professor George Grafton Wilson. To this are prefaced a foreword on "Henry Wheaton and International Law" and a sketch of the life of Dana, both by Professor Wilson, and the reproduction of a daguerreotype portrait of Wheaton in Professor Wilson's possession. The first issue of Wheaton was printed in 1836 in two simultaneous editions at London and Philadelphia, the preface being dated from Berlin, where the author was American Minister at the Court of Prussia.

It is unnecessary to say that the present volume reaches the very highest standard of scholarship, printing, and publication. On a classic of this kind a reviewer may perhaps be permitted to confine himself to an expression of gratitude for the enterprise which is responsible for such a publication. Since 1836 the output of work in international law has been prodigious: how far is the result proportional to the effort? If Wheaton could revisit Berlin, London, and Washington, what sort of an Appendix would he write?

J. F. W.

¹ p. 217: italics are mine.

L'Organisation judiciaire. La Procédure et la sentence internationales, par J. C. Witenberg en collaboration avec Jacques Desrioux. Paris: Éditions A. Pedone. pp. 436.

This work is described as a "Traité pratique" and deserves the name by reason of its clarity of expression, convenient arrangement, and, above all, the wealth of material compressed into a comparatively small compass. The book covers the whole of the subject indicated by its title. It begins by discussing the various types of compromissory provisions and of international tribunals, from a single *ad hoc* arbitrator to the Permanent Court of International Justice, and goes on to deal with procedure (including the admissibility and adoption of private claims), the nature and effect of decisions, and special points such as adjudication by default and decisions as to jurisdiction. The approach is usually historical, and propositions in the text are supported by footnotes containing references to decisions of international tribunals and other authorities. The authors do not purport to open up new ground, but their work is valuable as an ordered survey of material which is scattered far and wide, and sometimes difficult to find. The vastness of the area covered necessarily makes for general rather than detailed treatment in the text, and on some of the more technical points this has its drawbacks, but the citation of authorities enables the reader to push his researches further. Altogether a useful and scholarly book.

A. P. F.

REVIEWS OF CURRENT PERIODICALS

American Journal of International Law. Vol. XXX, 1936.

THE articles in this volume arrange themselves around three main topics: the Italo-Ethiopian dispute, the Permanent Court of International Justice, and the making of treaties. It is proposed, therefore, to depart from the usual practice of reviewing each number separately, and to discuss these three topics in turn.

An historical background of the Italo-Ethiopian dispute is contributed by Mr. W. B. Stern, who gives an account of the treaty-relations of Ethiopia with the Great Powers from the early nineteenth century onwards. Mr. Pitman B. Potter, one of the arbitrators appointed by Ethiopia, continues with an admirable first-hand account of the Wal Wal Arbitration and of the lessons to be drawn from it for arbitral practice in general. Finally Professor Quincy Wright, in discussing "The Test of Aggression in the Italo-Ethiopian War", gives an account of the League's procedure up to December 1, 1935. This lucid account is rendered the more useful in that the more important documents referred to are collected in the supplement of Official Documents, but one point must be discussed. Professor Wright implies, n. 51, that in deciding that Italy had resorted to war the Committee of Six adopted an "objective" test of war. This, however, is to ignore the fact that, before announcing any conclusions, the Committee took note of the Ethiopian invocation of Article 16 of the Covenant. It is not difficult for adherents of the "subjective" test to construe this invocation as clear evidence on the part of Ethiopia to accept the proved hostile acts of Italy as acts of war. However desirable it may be, it does not therefore seem clear "that absence of a declaration or other unequivocal expression of an intention by one of the belligerents to make war will not hamper the League in applying sanctions if the members desire to do so".

At this point may be mentioned an interesting examination by Professor Wild of the provisions for sanctions in international commodity agreements or cartels. He concludes that in business as in political organizations a sound sense of the community and of mutual interest must precede the creation of special punitive agencies. Apart from this community backing agreements are kept if they serve the parties well, and if they do not sanctions are mostly ineffective.

The work of the Permanent Court in its rather lean fourteenth year is reviewed as usual by Professor Manley Hudson, who also contributes an article on the 1936 amendments of its Rules. Professor Steiner discusses the fundamental conceptions of international law underlying the jurisprudence of the Court, and Dr. Jacoby considers the limitations on its jurisdiction resulting from the character of a dispute or from the concurrent jurisdiction of other international institutions.

The "Proclaiming of Treaties in the United States" is the subject of an important note by Professor Reiff. Charles Fairman discusses "Competence to bind the State to an international engagement", which includes the thorny problem of constitutional limitations and the treaty-making power. Walter Schiffer and Professor Wilcox describe "Treaty-making in Post-War Germany", and Mr. Denys Myers discusses the acceptance by the Senate of the General Treaty of Inter-American Arbitration.

A vigorous timely warning against "Abuse of Terms" is contributed by

Dr. Baty, who discusses "Recognition" and "War". Forty-nine instances of "armed invasion in time of peace" are analysed and explained away, and little sympathy is shown for legal definitions which do not square with the general sense of civilized opinion. Dr. Baty would hardly have agreed with the well-known railway porter that cats or rabbits could be dogs in law, or a tortoise be an insect. Other articles are "The Problem of Memel" by Professor Kalijarvi, "The Monroe Doctrine and the League Covenant" by Mr. J. H. Spencer, "The Japanese Foreign Office" by Professor Colegrove, "Soviet Citizenship" by Mr. Durward Sandifer, "The Meaning of Denial of Justice" by Mr. Oliver Lissitzyn, and "The Early American Attitude towards Naturalized Americans Abroad" by Professor Morrow.

The notes, comments, reports of cases, and reviews are as excellent as usual, and the supplement of Official Documents most useful. The contribution made by the *American Journal* to the study of international law can be regarded in this country only with envy and admiration.

B. E. K.

Revue Générale de Droit International Public. 1936.

There are several articles in the *Revue Générale* on the Permanent Court of International Justice and the law which it may have to apply. M. Kopelmanas discusses the provision in Article 38 (3) of the Statute of the Court under which the Court is to apply "the general principles of law recognized by civilized nations". His conclusion is that this provision has no meaning at all, and that according to the Statute there are only two "formal sources" of international law—treaties and custom. The same author's discussion of the Opinion of the Permanent Court in the case of the Danzig legislative decrees is a reasoned criticism of the views expressed by the Court and a discussion of such questions as the circumstances in which the Court can refuse to give an advisory Opinion and the presence of national judges. Dr. Rothholz contributes a well-documented article on "La Nature juridique des ordonnances de la Cour Permanente de Justice Internationale". His conclusion is that Orders made by the Court under Article 48 of the Statute must be clearly distinguished from Judgments, since the latter create between the parties a definite legal situation, while the effect of Orders is limited to the duration of the proceedings, and he is of opinion that on the whole the Court has observed this distinction, though it has occasionally found itself obliged, since there was no other course open to it, to make Orders which really do not fall within the scope of Article 48. Professor Sfériadès's "Aperçu sur la coutume juridique internationale et notamment sur son fondement" is a learned contention in favour of the view that custom can only be regarded as a source of international law in that it results from the tacit consent of those concerned: "elle doit, en d'autres termes, être censée reposer sur l'assentiment concordant de ceux dont elle est appelée à régir les intérêts". M. Ténékidès, Legal Adviser to the Greek Foreign Office, discusses the Calvo clause and concludes that it is completely null and void, both as between the two states concerned and as between the individual and the states who are parties to the contract in which the clause figures. "La Transformation du droit international en droit interne", by Professor Kelsen of Geneva, is a highly technical argument against the view that, since a treaty only creates rights or obligations for the states who are parties to it, and not for individuals, the treaty must be "transformed" into a law of the state concerned in order to enable its execution by

individuals to be ensured. Professor Kelsen's conclusion is that either this "transformation" is superfluous, or it is not really a transformation.

Among articles on particular subjects the following may be mentioned. Mr. Raymond Buell's "Le Canal de Suez et les sanctions de la S.D.N." is a translation of an article which has already appeared in English. It is a useful collection of material, but does not attempt to reach any conclusions. In an article on "Le Système juridique des garanties de la souveraineté de la Lithuanie sur le territoire de Memel", Professor Römer's of Kovno argues that Lithuanian sovereignty over the Memel Territory is guaranteed by the four Powers who transferred the territory to her by the Paris Convention of 1924; he contends that there are no international guarantees of Lithuanian rights and interests against encroachment by the authorities of the territory, but that Lithuanian rights are assured by the control which the Lithuanian Government are entitled, within certain limits, to exercise over the authorities of the Territory, and by the operation of the "tribunal statuaire" which has been established to deal with cases in which it is alleged that either the local or the central authorities have, in violation of the Statute, encroached upon the domain of the other. Professor Giraud's "L'admission des États dans la Société des Nations" is a useful analysis of the provisions of the Covenant and the practice adopted by the League in dealing with the admission of Members. Dr. Raestad contributes some "reflections" on Professor Gidel's *Le Droit international public de la mer*, Volume III, dealing particularly with the results of the Hague Conference of 1930, and the questions of territorial waters and the "contiguous zone". Dr. Belin's article on "La Portée de la neutralité américaine" discusses the recent American legislation on the subject, which he considers to be inspired entirely by a desire to keep out of war, though he doubts whether it will necessarily produce that result. Dr. Donker-Curtius in his article on "Statut juridique de l'assistance humanitaire neutre" argues that the assistance rendered by a neutral Red Cross Society to a belligerent must be clearly distinguished from the corresponding activities of the belligerent himself, despite the partial assimilation of the two effected by the Convention of 1906. Dr. Eustathiadès has an article on the proposal for an international criminal court which has emerged from the meetings of the Committee on Terrorism set up by the Council of the League. He is a convinced supporter of the idea of the court and sets out at length the advantages which he considers should result from its establishment. The discussion which took place, however, in the First Committee of the 1936 Assembly on the subject showed that the number of states who at present are in favour of this idea is distinctly limited. Professor Niboyet's "Les Immunités de juridiction, en droit français, des États étrangers engagés dans des transactions privées" is a report prepared for the International Congress of Comparative Law to be held in 1937; it gives an interesting account of the development of French law (which in this connexion is entirely case law) from the principle of the complete immunity of foreign states from the jurisdiction of the French courts, which was laid down by the Cour de Cassation in 1849, to the present position, resulting originally from a decision given by the Chambre des Requêtes in 1929, under which the commercial transactions of a foreign state fall within the competence of French tribunals. The French courts, however, do not regard such acts as the purchase of munitions, which fall within the ordinary activity of a state, as commercial transactions for this purpose, and it seems plain that the change in French law results from the action of the Soviet Union in making all foreign trade a state monopoly.

Under the heading "Jurisprudence Internationale" M. Hostie contributes an interesting analysis of M. Bagge's decision in the *Finnish Ships* case.

W.

Revue de Droit International et de Législation Comparée. Tome XVII, 1936.

The 1936 volume of the *Revue de Droit International et de Législation Comparée* maintains the high level of previous years. If a general criticism may be permitted, it is that some of the articles tend to become too long.

The volume opens with a very useful study by Professor Rousseau of Rennes, on the international-law aspects of the application of sanctions against Italy during the Abyssinian conflict. If this first effort to apply the principles of collective security may be considered to have met with a sufficient measure of success to justify the expectation that similar efforts will be made in future, Professor Rousseau's article will prove a mine of information to those who will be responsible for the direction of such future proceedings.

Professor Garner of Illinois pleads for the abandonment of the idea that it is useless to attempt to determine and fix by treaty the rules regulating the conduct of war. What is wanted in his view is a serious effort to restate the laws of war—and, particularly, of maritime war—in terms compatible with the development of modern methods of commerce and modern developments of communications. It is futile for neutrals to expect belligerents to apply rules for the conduct of warfare which date from the days of the sailing-ship and which take no account of the invention of the steamship, the railway, the aeroplane, and the telegraph, to say nothing of the wireless. The alleged breaches of the laws of war which occurred during the struggle of 1914–18 were in part due to the uncertainty as to what the laws of warfare really prescribed. It is an arresting article, but Professor Garner will find that powerful interests will be against him. They stand to gain too much through the laws of warfare being uncertain or non-existent.

Another striking article is contributed by Professor Sfériadès, of Athens, dealing with "Armed Reprisals in Time of Peace". He dissents from the Resolutions adopted by the Institute of International Law in 1934 at Paris. Those resolutions drew a distinction between armed reprisals and war. Professor Sfériadès believes that they would enable a state to resort to armed reprisals without committing a violation of the Pact of Paris (Kellogg). He can see no advantage in the theory that the law applicable in time of peace should subsist if a state resorts to armed reprisals, and would prefer that it should be the law of war which should apply. He urges that the Institute of International Law as a scientific body should have paid no heed to the contention that powerful states would not have accepted the resolutions if they had been drawn on a different basis.

Professor Charles De Visscher in an article entitled "La Technique de la personnalité juridique en droit international public et privé" discusses various questions which arise in connexion with the separation of the personality of a corporation from those of its constituent members, particularly as regards nationality—a problem which becomes acute in time of war in connexion with enemy character, and is ever present in time of peace as regards diplomatic protection.

Another interesting contribution is one by Dr. Hans Herz dealing with the question of the moment at which a new state comes into being. In form the article is a discussion of a decision given by the German-Polish Mixed Arbitral

Tribunal on August 1, 1929, in a case in which a German company carrying on business at Warsaw claimed damages for the liquidation of its property by the Polish Government under Article 297 of the Treaty of Versailles. The case is reported in the *Recueil des décisions des T.A.M.*, Vol. IX, p. 366. The decision constitutes a decisive precedent against the view that it is the recognition of a state which in law gives birth to it. It is possible that insufficient weight was attributed to this decision in the discussions about the Recognition of States at the Brussels meeting of the Institute of International Law in 1936.

Dr. Charley del Marmol writes on the part which the laws and usages of particular trades play in the development of the law of sale of goods, a subject of particular interest in view of the effort made during recent years by the Institute for the Unification of Private Law at Rome to draft a uniform law to regulate international sales of goods.

Other interesting articles deal with the extent to which neutral merchantmen expose themselves to the risk of condemnation by placing themselves under belligerent convoy (Dr. Gordon of Paris); with the Reform of the League of Nations (Jean Ray); with the hindrances to the development of international civil aviation by the recognition of the principle that states possess sovereignty over the air space above their territory (Dr. Goedhuis); and with the question whether the Danish Government did not violate the Convention of 1857 for the abolition of the Sound Dues by constructing a bridge over the Little Belt under which no vessel can pass if its mast-head exceeds 100 feet from the water-line.

There are also two articles on different subjects connected with the Advisory Opinions rendered by the Permanent Court of International Justice, and, as usual, excellent reviews of books and of articles in the periodicals devoted to international law.

C.

Journal du Droit International (Clunet). 1936.

The volume of *Clunet* for 1936 contains articles on the following subjects:

1. The double taxation agreement between the United States of America and France of April 1932 dealing with companies and their branches, by Jean Michel. (This article deals with a very technical subject but is well worth study.)

2. A review of Dutch jurisprudence for 1933-4 in matters of private international law, by Dr. van der Flier. This is an admirable exposition designed to give lawyers in other countries an idea of the trend of case law in the Netherlands.

3. A long article by Maximilian Philonenko on "Prescription extinctive" in private international law in which he discusses the difficult question of classification involved, and combats the view that prescription is always procedure and therefore governed by the *lex fori*, and maintains that each provision must be classified according to its own particular character.

4. An essay by P. Lepaulle on "La Nature et méthode de Droit International Privé", with a very satisfactory treatment of the question of Renvoi and classification.

5. A note by C. Denoyer and J. Denoyer on the question whether, in view of the treaties in force between the United Kingdom and France, British subjects bringing actions before the French courts are obliged to give security for costs. The authors are mistaken in their view that *all* French citizens are obliged to do this in the English courts—this is only when they are resident abroad (British subjects resident abroad also have to do so—so French citizens enjoy national

treatment). They have also failed to take account of the supplementary civil procedure convention between the two countries, which came into force a year ago.

6. An article by M. Domke on state loans issued in gold dollars and the effect of the Joint Resolution of Congress of 1933. The author remains an ardent partisan of gold clauses.

7. An article by J. Maupas on the claim brought before the Council of the League of Nations by Switzerland in respect of Swiss nationals who suffered damages during the war in the United Kingdom, France, and Italy. It explains the later stages of the proceedings at Geneva in which the claim was rejected.

8. An article by F. F. Ténékidès on Greek Private International Law in the matter of bankruptcy, a clear piece of exposition.

9. An article by N. Bentwich on the application of Jewish law in matters of marriage by English and French courts. The decisions referred to are principally those of courts sitting outside France and the United Kingdom.

10. An article by J. Barkey on the adoption of a single rule for the resolution of conflicts of laws relating to the determination of the conditions for the validity of contracts. The attempted synthesis of United States, English, and French law is not altogether convincing.

11. A note by A. Prud'homme on the French monetary law of October 1, 1936, and *les paiements internationaux*.

In addition there is the usual admirable collection of judicial decisions in different countries dealing with questions of international law. It is a pity, however, that a number of English decisions which could have been included do not appear.

E.

Revue Internationale Française du droit des gens. Tome II, 1936.

The second volume of this periodical contains a number of articles dealing with questions of principle which are of topical interest. Professor Yepes writes on "La Solidarité continentale américaine" and shows how some of the fundamental ideas of the Covenant were anticipated by the Pan-American movement. He describes the tendency of the South American Republics to regard the problem of security as one of regional rather than universal organization. M. Leresche contributes a study on "L'Évolution de la neutralité depuis la guerre mondiale" and examines the influence of League practice on the principles of neutrality. Professor Preuss has an interesting article on "La Répression par analogie dans le droit pénal national-socialiste". Professor Antonesco in "Le Fondement de la Société des Nations et la Crise de cet Organisme" expresses some radical criticisms of the League. He suggests that its defects are structural, and that a large part of its failure is due to an attempt to apply the "flexible" political methods of the Anglo-American communities to international problems and in particular to the problems of Continental Europe. Professor Devaux reflects on "les grands principes du droit international moderne". M. da Sylva discusses "la technique du droit pénal international", and criticizes the customary law and traditional doctrine on the subject. He advocates a "tribunal of conflicts" in criminal matters, for the international community. M. Römer's writes on "La Juridiction dite statutaire en Lithuanie en ce qui concerne le territoire de Memel". The distinguishing feature of the periodical is the part containing documents and notes on current international events, some of which embody useful material. A text of the Italian Law relating to Ethiopia, the declaration of the King of the Belgians

on October 15, 1936, and notes on the Spanish Civil War are useful and informative.

J. M. J.

Niemeyers Zeitschrift für Internationales Recht. Band LI (1935 and 1936). Berlin: Frantz Vahlen.

This volume of a very valuable publication contains articles by Peter Straub on the rights of ambassadors before presenting their letters of credit or after recall, by Heinrich Korts on the question of Memel as a problem of treaty revision, and by Paul Schoen on the legal nature of sanctions by the League of Nations.

The final conclusion of this latter article is that "The object of sanctions is not, and certainly is not specially, to punish the state against which they are employed but to compel it to obey those rules of the Constitution of the League which are supported by the threat of sanctions; the description of the sanctions of the League as punishments or remedies for breach of contract cannot be accepted". This agrees with conclusions reached in an article which appeared in this *Year Book* last year.

The volume also includes, as usual, full reports of the proceedings of the Permanent Court of International Justice, notes of cases of international interest in the German courts, reports of congresses, and reviews of publications.

J. F. W.

Zeitschrift für öffentliches Recht. Band XVI (1936).

Half of the articles in this volume are devoted to international law, maintaining a nice balance between history, philosophy, and positive law. History is represented by Johann B. Schuster, S.J., who examines the notion of *jus gentium* in the writings of Suarez. Philosophy, and especially the philosophy of Giorgio del Vecchio, is appealed to by Professor Meriggi of Modena in urging reform of the League. The philosophy of the Viennese school receives consideration by Dr. Wengler in a study of the problem of the Primacy of International law. On the border-line between theory and positive law is Dr. Sommer, who examines the ideological basis of the case against the most-favoured-nation clause, and concludes that the clause presupposes a free-trade world which has now been deserted by even its chief supporter, Great Britain.

With Professor Clyde Eagleton positive law comes into its own. He stigmatizes the attempt to define war, attack, or aggressor as outmoded, and demonstrates that any verbally effective prohibition must be against the use of force simply, save at the instance of an international authority. Dr. Hofbauer analyses Article 16 of the Covenant and ably contends for the well-known German view that it is for the Council to decide whether there has been a resort to war contrary to the terms of the Covenant. Dr. Bilestri of Haifa discusses the system of the "Open Door" in mandated territories and concludes that this system has worked well enough in preventing commercial conflicts between the Powers, but has yet to be reconciled satisfactorily with the interests of the mandated territory itself. Dr. Veiter discusses the principle of national autonomy and sees in its development a hope for lessening the tension in middle and eastern Europe. Dr. Kurt von Türcke does not seem quite so optimistic after an examination of the Minority Treaties and advocates treatment of minorities on a personal rather than on a territorial basis. Dr. Kunz gives an account of the British dispute with

Finland over the "Finnish" ships used in the Great War and regrets the Council's refusal to deal with the dispute as one not likely to lead to a rupture.

The editor, Professor Verdross, contributes a polemical article on treaties and the right to armaments which will not enhance his reputation and must be regretted by many of his friends. It may not be out of place to remark that Anglo-Saxon thought finds no contradiction in regarding a treaty as legally binding though inequitable in its terms. The French tendency to regard all legally binding instruments as necessarily equitable and the German tendency to regard all inequitable instruments as necessarily illegal and void seem equally unfortunate. Is it misleading to suggest that these tendencies are encouraged by a confusion of terms, and to describe them as a tendency on the one hand to regard all *droit positif* as *droit* and on the other to deny that anything can be *positives Recht* which is not at the same time *Recht*?

B. E. K.

Rivista di Diritto Internazionale. Vol. XV (1936). Rome: Athenaeum.

To English lawyers the most interesting feature of the *Rivista* for 1936 will be the appreciation by Professor Ago of Cavaglieri's manifold services to the study of international law. This will be welcomed by the wide circle of Cavaglieri's friends in this country. Other articles calling for notice are Professor Sereni's examination of the juridical nature of regional pacts, with special regard to the Little Entente and the Baltic countries, and Professor Ottolenghi's discussion of the relationship between effective control within territorial limits and the recognition of *de facto* sovereignty.

H. C. G.

Nordisk Tidsskrift for International Ret (Acta Scandinavica iuris gentium). Vol. VII (1936).

The review contains the lectures given at the Nobel Institute in Oslo by Dr. Raestad ("Sovereignty of States and International Law") and at the Swedish Institute for International Law by Dr. R. Erich ("The Problem of Sanctions").

Professor J. L. Brierly contributes an article on the Rule of Law in International Society. According to him it is doubtful whether codification is the right method of improving international law even if the practical difficulties of securing agreement could be overcome. In his view the conditions of the problem would seem rather to indicate that a strengthened rule of law would manifest itself, not of course to the exclusion of general rules of law where these are appropriate, but more especially in the development of institutions to facilitate the orderly solution of particular problems as they arise, and that the method would be predominantly co-operative rather than authoritarian. The Permanent Court of International Justice is a rallying-point for public opinion in support of the law. The work of the Court has shown that, as an institution adapted to its function, it is likely to need no major change. He particularly stresses the Court's value as a symbol of the reign of law and as a standing refutation of the principle that in the last resort every state ought to be the judge of its own conduct.

Mr. Chr. L. Lange contributes an article on "Hobbes et Spinoza, théoriciens de l'anarchie internationale", and Mr. E. Bruël considers the newly arisen problem of the legal position of female diplomatic representatives.

J. J.

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(In this Bibliography the following abbreviations are used: Acad. dip. int. = Académie diplomatique internationale; Acta Scan. = Acta Scandinavica Juris Gentium; A.J.I.L. = American Journal of International Law; B.Y.B. = British Year Book of International Law; Grot. Soc. = Grotius Society Transactions; H.R. = Recueil des Cours, Académie de Droit International de La Haye; J.C.L. = Journal of Comparative Legislation and International Law; J.D.I. = Journal de Droit International; J.I.L.D. = Journal of International Law and Diplomacy; L.Q.R. = Law Quarterly Review; Niemeyers Z. = Niemeyers Zeitschrift für internationale Recht; Rev. de der. int. = Revista de derecho internacional; Rev. de dr. int. = Revue de droit international; Rev. de dr. int. et de lég. comp. = Revue de droit international et de législation comparée; Rev. de dr. int., des sci. dip. et pol. = Revue de droit international, des sciences diplomatiques et politiques; Rev. Gén. = Revue générale de droit international public; Riv. di dir. int. = Rivista di diritto internazionale; V.u.V. = Völkerbund und Völkerrecht; Z. f. aus. int. Privatrecht = Zeitschrift für ausländisches internationales Privatrecht; Z. f. aus. öff. R. u. V. = Zeitschrift für ausländisches und öffentliches Recht und Völkerrecht; Z. f. V. = Zeitschrift für Völkerrecht.)

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